Supreme Court
FILED
98 153 JUL 20 1998
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No.

In The

Supreme Court of the United States

October Term, 1997

KEVIN N. FLYNN and RANDY WOLFSON,

Petitioners,

v.

CITY OF BOSTON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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Lutz Appellate Services, inc.

86 pp

QUESTIONS PRESENTED

1. Is it constitutional to fire a public employee for political reasons based on the employee's "policy-related" position in the municipal hierarchy rather than whether the actual duties of the position require political party affiliation?

2. Is it constitutional to fire a public employee for political reasons where state law prohibits the conditioning of public employment on political service?

3. Is it constitutional to fire a public employee for not performing political service where state law chartering the municipal employer provides that city elected offices be non-partisan?

4. Is it constitutional to fire a public employee for political reasons in order to suppress non-partisan speech on matters of legitimate public concern, where the speech promotes the public interest and is in furtherance of the employee's job responsibilities?

LIST OF PARTIES

The parties to the proceeding before this Court are:

Petitioners:

KEVIN N. FLYNN AND RANDY WOLFSON, individually as employees of the City of Boston deprived of their status as city employees.

Respondents:

CITY OF BOSTON, as a body corporate and politic and the former employer of petitioners Kevin N. Flynn and Randy Wolfson;

THOMAS MENINO, individually and in his official capacity as Mayor of the City of Boston;

BOSTON COMMUNITY CENTERS, as an official agency of the City of Boston; and

EVELYN RIESENBERG, individually and in her official capacity as Executive Director of Boston Community Centers.

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Appendix C — Excerpts From 1994 Boston Community Centers Operational Manual 48a

The petitioners, KEVIN N. FLYNN and RANDY WOLFSON, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on May 12, 1998.

OPINIONS BELOW

The decision and opinion of the United States Court of Appeals is reported at 140 F.3d 42 (1st Cir. 1998). The decision and opinion together with the dissenting opinion thereto are reprinted in the appendix hereto, p. 1a, *infra.*

The decision and opinion of the United States District Court for the District of Massachusetts is reported at 944 F. Supp. 81 (D. Mass. 1996). The decision is reprinted in the appendix hereto, p. 22a, *infra.*

STATEMENT OF JURISDICTION

This case arose under the provisions of 42 U.S.C. § 1983 and directly under the First Amendment for violation of Petitioners' First and Fourteenth Amendment rights. The District Court had jurisdiction of these claims pursuant to 28 U.S.C. §§ 1331, 2201. The District Court had jurisdiction over the Petitioners' wrongful discharge claims under the doctrines of pendent and supplemental jurisdiction of related state law claims arising out of the same course of events as the federal questions. On November 5, 1996, the District Court granted Respondents' motion for summary judgment.

The Court of Appeals for the First Circuit had jurisdiction of these issues pursuant to 28 U.S.C. § 1291. The Court of Appeals, on May 12, 1998, entered a judgment and opinion upholding the ruling of the District Court. Senior Circuit Judge

John R. Gibson, of the Eighth Circuit sitting by designation filed a written dissent.

This Honorable Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTE INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MASSACHUSETTS STATUTES INVOLVED

Mass. Gen. Laws ch. 55, § 16:

> No person in the public service shall, for that reason, be under obligation to contribute to any political fund, or to render any political service, and shall not be removed or otherwise prejudiced for refusing to do so.
>
> Violation of any provision of this section shall be punished by a fine of not less than one hundred nor more than one thousand dollars.

Charter of the City of Boston, enacted as a Massachusetts statute by 1948 Mass. Acts 452:

> Section 63. No ballot used at any preliminary or regular election shall have printed thereon any party or political designation or mark, and there shall not be appended to the name of any candidate any such party or political designation or mark or anything showing how he was nominated or indicating his views or opinions.

STATEMENT OF THE CASE

This case is before this Honorable Court after the First Circuit Court of Appeals upheld the District Court's grant of summary judgment against Petitioners on their Federal claims that they were improperly terminated from public employment for political reasons and to repress and punish their speech on important matters of legitimate public concern.

Both Petitioners were employees of the central office of the Boston Community Centers ("BCC"), a subordinate agency of the City of Boston.[1] Petitioner Flynn was the Associate Director of Administration and Finance for the BCC; Petitioner Wolfson was one of two Associate Directors of Field Operations within the BCC. Both had worked in professional positions for the BCC for a number of years. Neither Petitioner had been affiliated with any candidate or political campaign in the 1993 mayoral election.[2]

According to its "Operations Manual," the BCC's role as a city agency is to provide technical assistance to local community school councils in implementing community programs. App. C at 48a-51a. According to that manual, the agency's policies, programs, goals and objectives are set by the Director of the BCC, the Mayor of the City of Boston, and elected neighborhood councils in conjunction with a citywide board elected from those councils. Neither Petitioner's position is responsible for policy as set forth in the BCC Operations Manual.

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1. The BCC and the local community school councils provide community programs, not formal education of the City's children, which is provided by the separate Boston School Department.

2. In Boston, city elected officials are non-partisan. There are no party primaries, and the City Charter *requires* that no party affiliation be printed on the ballot. *See* Charter of the City of Boston § 63 (1948 Mass. Acts 452).

Petitioner Flynn's job involved implementing the department's administrative and financial procedures, and ensuring that all activities of the central office and local sites were conducted in accord with city, state and federal rules and regulations. Wolfson's job was to provide technical assistance to local councils, supervise local site coordinators for approximately half the community center sites, and convey information from the community and site staff to the executive director (Respondent Riesenberg).

Both Petitioners' positions had some supervisory responsibilities. However, neither Petitioner had direct authority to hire or fire BCC employees. Both Petitioners reported to the agency's executive director, Riesenberg. Flynn and Wolfson were two of the BCC's five central staff members who did so directly. Neither Petitioner reported to the Mayor.

Respondent Riesenberg formerly served the Mayor (Respondent Menino) on his staff when he was a city councillor. Riesenberg was appointed acting executive director for the BCC in January 1994. Almost immediately, Riesenberg undertook to politicize the BCC.

Riesenberg pressured Petitioner Wolfson, against her demurrer, to indicate which BCC senior staff members had worked for particular mayoral candidates. Riesenberg asked Petitioner Flynn how she could fire the entire BCC central office staff and replace them with her own supporters or those of the Mayor. Petitioners stated their positions against these politicizing activities to Riesenberg.

Over the next few months, both Petitioners expressed concerns about and objections to Riesenberg's attempts to appoint unqualified allies of the Mayor to positions impacting public safety, such as adult youth workers conducting activities

to steer children away from gang membership. For example, in one case Riesenberg ordered them to hire an individual for an important youth street worker position, unless he was "dumb as dirt." In another instance, Riesenberg ordered that Petitioners hire an individual as youth athletic director of a community center, whose employment application revealed no information showing qualifications, only a notation that his resume was on file with a Menino campaign worker.

Despite his warnings, Riesenberg ordered Petitioner Flynn to process a pay raise for a union employee in violation of the union contract (the union ultimately filed a grievance), and ordered the hiring of a second individual to perform the duties of the politically connected but incapable youth street worker, effectively paying two public salaries to perform one job, in violation of the federal grant which funded the single position.

Respondent Riesenberg improperly shielded two political allies of the Mayor who had been accused of sexual harassment. Petitioner Flynn's assigned duties included BCC liaison with the City's law and personnel departments concerning such matters. Petitioner Wolfson oversaw and provided technical assistance to the center at which one complainant was based, and was the recipient of the original sexual-harassment complaint in that matter. When Petitioners urged serious treatment of the cases, Riesenberg removed them from further involvement with the cases. In one matter, after terminating the Petitioners, Respondent Riesenberg promoted one of the alleged sexual-harassment offenders, a Menino ward coordinator, who continued to supervise the harassment complainant until the complainant left city employ. In a second case, involving serious allegations by two women against a former co-worker of Riesenberg's on Menino's City Council staff, Riesenberg arranged modification of the official city punishment recommendation to allow the offender to keep his office in the building where he continued to have access to the complainants.

In August 1994, Respondent Riesenberg terminated Petitioners. When Petitioners' counsel wrote the Mayor in protest, the city's corporation counsel responded in writing with the pretext that the terminations were made, not for political reasons, but due to reorganization and evaluation of the Petitioners' employment performance. Massachusetts state law prohibits conditioning public employment on provision of political service. *See* Mass. Gen. Laws ch. 55, § 16 (1990).

None of the BCC formal procedures for performance evaluations were followed, however, and no evaluations were present in either Petitioner's personnel file. The BCC's personnel director testified at deposition that during Petitioners' exit interviews Riesenberg stated that the firings were not based on performance.

The alleged reorganization did not comply with the requirements set forth in the BCC Operations Manual. Riesenberg's top assistant stated at deposition that the "changes in the organizational chart were secondary to the changes in personnel." No new organizational chart was published, and the Petitioners were replaced by Menino campaign workers who were offered their jobs before the jobs were posted, in further violation of the BCC Operations Manual.

After their firings, Petitioners brought suit in district court against the City, Respondent Riesenberg and the Mayor under 42 U.S.C. § 1983, the First and Fourteenth Amendments, and pendent state statutory and common law claims.

Ultimately, the District Court granted Respondents summary judgment. In the Memorandum of Decision the District Court found that Petitioners had adduced sufficient evidence that their firings were politically motivated, but held that Petitioners were "policy workers" in "confidential" positions who could be

terminated for political reasons. The District Court further held that Petitioners' speech was private protest to a supervisor, thus not protected by the First Amendment, and that their terminations therefore did not violate public policy. Petitioners appealed.

The First Circuit majority, Boudin, C.J., upheld the District Court's summary judgment for Respondents on the constitutional and federal law claims, but vacated the judgment on the state law claims on the basis that without federal claims, the state claims should be more properly decided in state court. Without mentioning the state statute prohibiting the conditioning of public employment on political service, the First Circuit held that the Petitioners' firings were constitutional because their positions in the hierarchy of the BCC and their proximity to the policymaking director made them "policy-related." App. A at 11a-12a. The First Circuit assumed that Petitioners' speech was on matters of public concern.

The First Circuit further held that if an employee is subject to discharge for political reasons, that employee can be discharged for speech on matters of public concern regardless of the First Amendment, except in the extremely limited circumstances that the speech involved reporting a crime or was of a religious nature. App. A at 11a.

The First Circuit did not give weight to whether Flynn and Wolfson's speech promoted the public interest and government efficiency. The court held that due to their positions, the speech might have an effect on their "working relationship" with Riesenberg. App. A at 10a. Therefore, the court stated that Riesenberg "was permitted to conclude reasonably that she did not have the necessary trust and confidence to retain them," regardless of whether "they may have been 'right'. . . ." App. A at 10a-11a.

In his dissent, Senior Circuit Judge Gibson argued that the court failed to examine closely the functions of each employee's department and particular position responsibilities to determine if partisan affiliation was a valid requirement. App. A at 12a-13a (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). He found that the Petitioners held politically-neutral, technical, and professional positions, for which political party affiliation was not a valid requirement; that Petitioners had "raised a genuine factual issue" that their speech constituted matters of legitimate "public concern protected by the First Amendment"; and that the pendent state common law wrongful termination claims should have survived summary judgment. App. A at 20a.

REASONS FOR GRANTING THE WRIT

In this matter, two city employees were fired for the diligent performance of their jobs through the exercise of their First Amendment rights to free speech and for not silently serving the improper aims of a political supervisor. Under the *Elrod* and *Branti* line of cases, this Court has held that firing government employees for political beliefs is unconstitutional unless party affiliation is an appropriate requirement for their particular job. *See Branti*, 455 U.S. at 518; *Elrod v. Burns*, 427 U.S. 347, 353 (1975). In the *Pickering* line of cases, this Court requires a balancing test for determining when a government agency may fire employees, curtailing their free speech, in order to serve government efficiency. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

The circuit courts have confused and inconsistently applied both the *Elrod/Branti* analysis and the *Pickering* balancing test. Numerous decisions recognize this confusion[3] as did the First

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3. *See Cutcliffe v. Cochran*, 117 F.3d 1353, 1360 (11th Cir. 1997) (Harris, J., concurring) ("Is there confusion in this area of the law? Members

(Cont'd)

Circuit majority in the instant case. Regarding the *Elrod/Branti* question, the First Circuit stated,

> the lower federal courts have tried to develop doctrine, but it is largely a porridge of general statements and variables: positions are less likely to be protected to the extent that they are "higher," more "political," more "confidential," and so on; duties prevail over titles; everything depends on circumstances.

App. A at 4a.

In discussing *Pickering*, the First Circuit stated that federal appeals courts have had a great deal of difficulty in defining when and how to strike the balance as "[t]he legal standard in this area is notoriously fuzzy because the cases deal under the same head with very different problems and 'justifications.' " App. A at 8a.

The instant case arises from the convergence of the *Elrod/Branti* and *Pickering* lines of cases. In cases where the *Elrod/Branti* and *Pickering* analyses are intermixed, an assay of the circuits establishes that they are conflicted and confused as to which line of cases governs, and/or how much weight to give one or the other. *See McEvoy v. Spencer*, 124 F.3d 92, 99 n.4 (2d Cir. 1997) (assembling cases demonstrating that "[w]here a

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(Cont'd)
of the Supreme Court are among those who have expressed their belief that there is, and my study of the subject matter leads me to the same conclusion. . . . I also believe that the subject matter cries out for elucidation from the Supreme Court in some appropriate future case.") *See also McEvoy v. Spencer*, 124 F.3d 92, 99 (2d Cir. 1997) (noting conflict amongst the circuits); *Upton v. Thompson*, 930 F.2d 1209, 1214 (7th Cir. 1991) (noting conflict amongst the circuits).

choice needs to be made between application of the *Pickering* and the *Elrod* lines of cases, the characterization of the distinction between the doctrines will often be determinative"). Without guidance from the Supreme Court, the lower courts will continue to add to the "porridge of decisions," determining government workers' constitutional rights on a wholly ad hoc basis, inconsistent with each other and with Supreme Court precedent.

This case presents an opportunity for the Supreme Court to provide proper guidance to resolve these inconsistencies. It presents a set of facts which would allow the Court to clarify and provide answers to many if not all of the questions with which the circuits have struggled, including the proper interrelationship of *Elrod/Branti* and *Pickering*. This case provides an opportunity for this Court to instruct as to what roles state law and the public interest implicated by the employee's speech play in balance to defenses based on claims of government efficiency. If left to stand, the First Circuit's decision imposes a new rule that is dangerous to the public's interest in good and efficient government and the First Amendment rights of conscientious government managers throughout the United States.

I.

THE FIRST CIRCUIT'S DECISION INCORRECTLY APPLIED THE *ELROD/BRANTI* AND *PICKERING* TESTS.

The instant case involves allegations that government employees were fired both for their political non-affiliation and to suppress their non-partisan exercise of First Amendment rights for political reasons. Thus, this Court's precedent requires a *Pickering* test, conducted in light of a reasonableness analysis

of the requirement of partisan political affiliation. As Justice Kennedy wrote in *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712 (1996), mixed cases, like political affiliation cases, require an inquiry as to whether

> the affiliation requirement is a *reasonable* one . . . . A *reasonableness* analysis will also accommodate those many cases, . . . where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable.

Id. at 719 (emphasis added).

Contrary to *O'Hare*, in the instant case, the First Circuit did not properly apply the *Pickering* balancing test or a reasonableness analysis to judge the need for partisan affiliation. Rather, the First Circuit formulated a new test, which is unsupported by citation to authority and contrary to previous decisions of this Court.

First, the First Circuit, without reference to the state law that made political service an unlawful requirement, applied a weakened version of the *Elrod* test, holding that termination for political reasons was proper where the positions were merely "policy-related,"[4] rather than focusing, as *Branti* and its progeny require, on whether the duties of each position reasonably required party loyalty. App. A at 11a.

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4. Judge Gibson wrote in his dissent,

> [T]he court today focuses on job title and place in the organizational hierarchy to decide whether a position is subject to a political affiliation requirement. The majority measures the distance from [Petitioners] to [Respondent] Riesenberg, a policymaker, to determine whether their jobs are political.

App. A at 12a.

Then the First Circuit, rather than applying *Pickering*, created what it called a "reasonable working rule," that where an employee could be fired for political reasons under *Elrod*, that employee could be fired based on his or her speech "without offending the First Amendment's free speech guarantee."[5] App. A at 10a.

The First Circuit, in creating this new "working rule," effectively expands the scope of government employers' rights to fire employees for their political beliefs beyond that set by *Elrod*, even though this Court subsequent to *Elrod* has limited, rather than expanded, the government employer's powers under the *Elrod* rule. *See O'Hare*, 518 U.S. 712; *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti*, 455 U.S. 507. In *Branti* this Court limited the government's right to fire employees for political beliefs to those situations where "partisan affiliation" is involved in both the employee's position, and the employee's conduct that ultimately led to his or her being fired. *See Branti*, 445 U.S. at 518.

The First Circuit curtails speech on matters of legitimate public concern by expanding government employer's rights to fire employees in mere "policy-related" positions for their speech. This expansion is a retrenchment from this Court's precedent. This Court held in *Pickering* and its progeny that protection of speech on matters of public concern is extremely important to the workings of a democracy. *See, e.g., Pickering*, 391 U.S. at 572-73. Further, this Court has stressed that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Instead, the First Circuit rule says to a government manager that any speech, even if it

5. The fact that the First Circuit uses the term "working rule" to refer to its new rule indicates the First Circuit's uncertainty in the permanent value of such a rule absent the Supreme Court's guidance.

merely expresses what the employee reasonably believes is required by the duties of his position, can and will be used against him.

The First Circuit's new "working rule" encourages bad public policy, as it invites government employers to characterize as "policy-related" as many employees as possible. At the same time the First Circuit's new rule chills the speech of honest government employees who do their jobs by conveying to their supervisors what they believe to be accurate, responsible information on important public issues. The effect is to discourage honest and efficient government.

II.

OTHER CIRCUITS WOULD HAVE APPLIED DIFFERENT TESTS FROM THE FIRST CIRCUIT'S NEW RULE AND LIKELY FOUND FOR PETITIONERS.

The First Circuit's new rule allows the determination of "policy-related" for a government employee's position to trump the entire *Pickering* analysis, even in cases where the speech at issue is wholly non-partisan and actually serves the public interest. App. A at 8a, 11a.

In contrast, the Fourth Circuit requires a jury trial to determine the employer's motivation in mixed cases. Where the motivation is determined to be party affiliation alone, that circuit applies *Branti* in a more comprehensive detailed analysis of the party affiliation requirement, based on the duties of the employee's position, with special attention to the effect of state law. Where motivation for a firing is based on speech, the Fourth Circuit applies the *Pickering* test.[6] *See Jones v. Dodson*, 727 F.2d 1329, 1335 n.4 (4th Cir. 1984).

6. Where the speech is purely political advocacy in the context of a political contest, then the *Branti* analysis takes precedence. *See Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997), *cert denied*, __ U.S. __, 118 S. Ct. 881 (1998).

The Fourth Circuit would likely have decided this case differently under the *Branti* or *Pickering* analyses where the Petitioner's speech was neither partisan nor made in the context of a political contest. Further, the instant case involves a specific state law which expressly protects public employees from termination for political reasons. The Fourth Circuit gives great weight to how a state legislature defines a specific position held by a public employee. *See Jenkins v. Medford*, 119 F.3d 1156, 1163-64 (4th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 881 (1998).

The Seventh Circuit uses an impact test in deciding whether to apply *Elrod/Branti* or *Pickering*. *See Heideman v. Wirsing*, 7 F.3d 659, 662 (7th Cir. 1993); *see also Kline v. Hughes*, 131 F.3d 708, 709-10 (7th Cir. 1997); *Americanos v. Carter*, 74 F.3d 138, 140-41 (7th Cir. 1996). The circuit's analysis of a mixed speech and political affiliation case "depends on the manner in which the exercise of an employee's First Amendment rights may impede the effective functioning of the public office in question." *Heideman*, 7 F.3d at 662. In *Heideman*, the Seventh Circuit upheld the firing of a deputy sheriff whose extreme speech in support of his employer's electoral opponent "suggested that his presence in the sheriff's department would not foster the necessary cooperation" among the various members of the sheriff's department. *Id.* at 664. The Seventh Circuit would likely decide the instant case in favor of Petitioners because their speech did not involve partisan content nor was made in the context of a political contest, but rather was technical advice consistent with the public interest.

The Second Circuit decides "mixed cases" based on whether the employee's expression involved partisan political issues, in the context of a political contest. *See Regan v. Boogertman*, 984 F.2d 577, 581 (2d Cir. 1993) (finding *Elrod* applied where the employee was fired for her "conduct in opposition to the

reelection of the incumbent officeholders"). The Second Circuit refined its test in a later case, where a policymaker was fired "solely for speaking out on matters of public concern, [recognizing] that the policymaker's political beliefs played no role in the employer's decision," thus finding *Elrod* inapplicable and applying *Pickering*. *McEvoy*, 124 F.3d at 101. The Second Circuit would likely have found for Petitioners where their speech was non-partisan and not made in the context of a political contest.

In the Sixth Circuit, a public employee may not be discharged for political reasons unless he falls into one of four categories.[7] *See McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996). Petitioners do not fall into any of the four categories

7. The four categories are:

> Category One: positions specifically named in relevant federal, state, county or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted; Category Two: positions to which a significant portion of the total discretionary authority available to category one position holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions; Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or category two position holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

McCloud, 97 F.3d at 1557 (citations omitted).

and therefore under the Sixth Circuit's test could not be discharged because of their political association.

III.

THE DECISION BELOW IS INCONSISTENT WITH FIRST CIRCUIT PRECEDENT IN ITS APPLICATION OF THE *BRANTI* TEST.

The First Circuit's new rule amplifies circuit inconsistencies by fundamentally departing from its prior cases. In *DeChoudens v. Goverment Dev. Bank*, the First Circuit, upheld an injunction preventing the termination of a confidential, policymaking employee who had been fired due to her political affiliation. 801 F.2d 5, 6 (1st Cir. 1986) (en banc). The First Circuit analyzed De Chouden's position as a senior vice president of the Puerto Rico Government Development Bank and determined that:

> although the position at issue involves policymaking, the reposing of confidence, and communicating, we presently conclude that such functions are so remote from advancing or thwarting the agency's partisan-responsive goals that political affiliation would not be considered an appropriate requirement.

Id.; *see also Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986) (applying *Branti* test by asking whether "party goals or programs affect the direction, pace, or quality of governance").

In the instant matter, the First Circuit truncated its analysis to determine simply whether or not the employees were involved in "policy-related" functions. App. A at 10a-11a. Thus, the First

Circuit has gone against its own precedent as well as that of this Court, in applying only a modified *Branti* test.

IV.

THE FIRST CIRCUIT DECISION ADDS TO CIRCUIT CONFUSION AND THREATENS FEDERALIST PRINCIPLES BY IGNORING THE EFFECT OF STATE LAW.

Much of the confusion among the circuit courts in cases of government employee termination involves the proper use of state or municipal law and the treatment of mid-level managers. However, in the decision below the First Circuit ignored both state law and the Charter of the City of Boston. Massachusetts law expressly prohibits requiring any public employee "to render any political service" and prohibits the removal of any public employee for refusing to render such service. *See* Mass. Gen. Laws ch. 55, § 16. Similarly, the City of Boston Charter (a state law) explicitly makes city elected offices, including the office of Mayor, non-partisan. *See* Charter of the City of Boston § 63.

The First Circuit's neglect of state law threatens federalist principles by ignoring the determination of Massachusetts elected representatives that public employment in Massachusetts cannot be conditioned on political service and that Boston City Government be non-partisan. As the Second Circuit has explained:

> Both the interests of federalism and the conservation of judicial resources would ordinarily be better served by the federal courts' giving substantial deference to the state's judgment where government positions are so defined. Otherwise, federal courts

> will be embroiled in determining at each change of state or local administration which positions are appropriately within the political patronage system. Such a determination not only creates the possibility of a super-civil service overseen by the courts, but allows the federal judiciary to intrude undesirably into the very structure of state and local governments.

Savage v. Gorski, 850 F.2d 64, 69 (2d Cir. 1988).

The First Circuit's failure to consider the effect of state law conflicts directly with the Third Circuit's consideration of a similar state statute in *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991). In *Zold*, the Third Circuit held that political affiliation was not a reasonable job requirement for the municipal clerk-the highest ranking full time municipal employee. *See Zold*, 935 F.3d at 636, 637. The *Zold* court found it significant that the state legislature made the municipal clerk's office nonpolitical. *See id.* at 638. The Fourth Circuit, which gives great weight to state law, would likely hold similarly, since state law in Massachusetts makes all public jobs including Petitioner's jobs non-political. *See* discussion *supra* pp. 14-15.

V.

THE FIRST CIRCUIT'S NEW RULE IMPROPERLY AVOIDS THE PARTISAN REQUIREMENT OF THE *ELROD/BRANTI* TEST DESPITE THE STATE-ENACTED MUNICIPAL CHARTER WHICH PROVIDES THAT CITY POLITICAL OFFICES BE NONPARTISAN.

Petitioners Flynn and Wolfson were discharged in order to suppress their speech for political, but not partisan, reasons. In *Elrod*, this Court explained that "[a]lthough political patronage comprises a broad range of activities, we are here concerned

only with the constitutionality of dismissing public employees for *partisan* reasons." *Elrod*, 427 U.S. at 353 (emphasis added). *Branti* further held that:

> the ultimate inquiry . . . is whether the hiring authority can demonstrate that *party affiliation* is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518 (emphasis added). The policy behind limiting patronage dismissals to those involving the need for political party affiliation is to allow elected officials to carry out the platforms of their party. Parties have a special place in our democracy and are thus protected by the First and Fourteenth Amendments. *See Rutan*, 497 U.S. at 69-71; *Elrod*, 427 U.S. at 355-57.

This important and unique status of political parties in our system explains the significance of the deliberate use of the term "partisan" political interests, used by both majority and dissenting justices since the development of the doctrine in *Elrod*.[8] *See Elrod*, 427 U.S. at 353; *see also Rutan*, 497 U.S. at 64 (stating that *Elrod* and *Branti* "decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved").

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8. The Sixth Circuit has pointed out that the best evidence of the Supreme Court's partisan requirement is Justice Scalia's dissent in *Rutan*, " '[w]hat the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs.' " *McCloud*, 97 F.3d at 1548 (citing *Rutan*, 497 U.S. at 109) (Scalia , J., dissenting). The First Circuit seems to have abandoned its own prior focus on whether or not a position involved matters of partisan concern, applying effectively the same rule for positions involving "matters devoid of partisan concerns." *See Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987) (citing *DeChoudens*, 801 F.2d. at 10).

The Charter of the City of Boston, enacted by the Massachusetts state legislature, makes elected city positions, including the position of the Mayor, nonpartisan. *Elrod*, *Branti*, and *Rutan* preserve party loyalty rather than loyalty to particular candidates or officials. Petitioners are merely employees of a subordinate agency under the non-partisan mayor.

Neither Respondents nor the First Circuit identify any party goals which are threatened by Petitioners' speech. In fact, as Judge Gibson notes in his dissent, the record contains "no evidence that [Wolfson's] position allowed her to make partisan decisions, nor is there any suggestion that she ever communicated any political message." App. A at 17a. He also found that Flynn's functions were "remote from advancing or thwarting the agency's partisan responsive goals." App. A at 18a-19a. Therefore, in line with *Elrod/Branti* and its progeny, patronage firings cannot be constitutional under a non-partisan system.

VI.

THE FIRST CIRCUIT'S FAILURE TO CONSIDER THE LEGITIMACY OF THE GOVERNMENT INTEREST IN SUPPRESSING THE SPEECH AT ISSUE OR THE PUBLIC INTEREST FURTHERED BY SUCH SPEECH IS IN CONFLICT WITH OTHER CIRCUITS.

The First Circuit did not consider whether the Petitioners' speech actually promoted government efficiency, nor did it discuss most of the factors relevant to the *Pickering* balancing test.[9] While the court did consider the potential detrimental

9. Among the *Pickering* factors omitted from the First Circuit's analysis were: the context of the employee's speech, the speech's effect on the employer's ability to discipline employees, the speech's effect on the harmony among co-workers and the speech's impact on the employee's job duties and regular operation of government. *Cf. Rankin*, 483 U.S. at 388; *Connick v. Myers*, 461 U.S. 137, 150 (1983); *Pickering*, 391 U.S. at 570-73.

impact on "close working relationships for which personal loyalty and confidence are necessary," it made that determination solely on Petitioners' proximity to the policymaker, Riesenberg, and did not balance this impact against the public interest furthered by their speech. Thus, the First Circuit effectively held that Petitioners' First Amendment interests, as well as the public interest in preventing government malfeasance, were overwhelmed by the potential disruption which might result from Petitioners' speech to their superior concerning the proposed hiring of unqualified persons to work with children, noncompliance of proposed actions with federal grant requirements, and proper adherence to the agency's own sexual-harassment policies.

In contrast, the Third, Fifth, Seventh, Eighth and Ninth Circuits impose a "legitimacy" requirement on the government interest in the *Pickering* balance, preventing it from outweighing an employee's First Amendment rights and the public interest[10] when the speech aids in preventing or exposing government malfeasance, despite the disruption that may occur to the agency. *See, e.g., Azzaro v. County of Allegheny,* 110 F.3d 968 (3d Cir. 1997); *Johnson v. Multnomah County, Oregon*, 48 F.3d 420, 427 (9th Cir. 1995) (finding County has no legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding disruption); *Davis v. Ector County, Tex.*, 40 F.3d 777, 782-84 (5th Cir. 1994) (finding that state's interest in promoting the efficiency of public service did not outweigh the public's interest in speech regarding sexual-harassment report); *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 803-04 (8th Cir. 1993) (finding dispatcher's speech regarding disapproval of departmental policies did not further any legitimate government

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10. "[T]he public's substantial interest in unearthing governmental improprieties requires courts to foster legitimate whistleblowing." *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1274 (3d Cir. 1994).

interest); *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988) (finding an employee's compelling First Amendment interest in pointing out to government officials what she perceived as government malfeasance outweighed potential for office disruption).

Azzaro involved a similar situation to the case at bar. In that case the Third Circuit applied the *Pickering* balancing test to a public employee's report of sexual harassment and found the government interest to be negligible. *See Azzaro*, 110 F.3d at 980.

> By adopting a policy against sexual harassment and a process for reporting and dealing with it, [the county] had affirmatively recognized that complaints about sexual harassment were important to its ability to serve the public effectively and efficiently.

Id.

In contrast, the First Circuit held that Riesenberg's purported right to politically loyal managers outweighed Petitioners' First Amendment rights and the public's interest in preventing improper behavior. Although the court recognized that Flynn and Wolfson may have been "public servants honestly resisting very dubious behavior by a superior," it nonetheless held that "it does not make any difference that [they] may have been 'right' and Riesenberg wrong in the positions urged or taken." App. A at 8a, 11a.

VII.

THE DANGER TO THE PUBLIC INTEREST FROM THE FIRST CIRCUIT'S NEW RULE REQUIRES THE SUPREME COURT'S CORRECTION.

The circumstances surrounding Petitioners' dismissals are arguably worse than those involved in a so called whistleblower case. These Petitioners were fired merely for expressing what they honestly believed to be accurate party-neutral information as to the propriety of various proposed actions-speech which they reasonably believed to be required by their job responsibilities. They were fired so that the improper conduct could occur without objection.

Allowing the First Circuit's new "working rule" and these firings to stand would inevitably chill government managers from telling their supervisors that they believed proposed action or conduct to be improper or unlawful, because they could be fired if they did. This would hurt the public interest in two ways.[11] First, it would allow improper conduct to occur with the attendant cost and harm to the public interest, when if the objection had been made, it might have been prevented. Second, it would discourage whistleblowing following the occurrence of improper conduct, since employees who feared for their jobs too much to speak out before the fact would be unlikely to have the courage to blow the whistle afterwards. The new First Circuit rule will lead inexorably to a nation of government managers, who like the character Sergeant Schultz of the 1960's *Hogan's Heroes* television show, "see nothing . . . hear nothing."

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11. The First Circuit suggests that elections are the appropriate cure for wrongful conduct of public officials, but under a system in which government managers are chilled by the First Circuit's new rule, the public would likely never learn of the improper conduct.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the First Circuit to review the questions presented by this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 12, 1998

United States Court of Appeals
For the First Circuit

No. 97-1076

KEVIN N. FLYNN AND RANDY WOLFSON,

Plaintiffs-Appellants,

v.

CITY OF BOSTON, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Richard G. Stearns, U.S. District Judge]

Before

Boudin, *Circuit Judge*,

John R. Gibson*, *Senior Circuit Judge*,

and Pollak**, *Senior District Judge*.

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* Of the Eighth Circuit, sitting by designation.

** Of the Eastern District of Pennsylvania, sitting by designation.

Appendix A

* * *

May 12, 1998

BOUDIN, *Circuit Judge*. Kevin Flynn and Randy Wolfson appeal from the district court's grant of summary judgment in favor of the defendants in their action alleging that they were discharged from their jobs with Boston Community Centers in violation of the First Amendment. Their former employer is an agency of the City of Boston with 400 employees and a budget of $15 million. It is concerned with the delivery of social services, including child care, youth work, and senior citizen programs, and it administers grants both from city funds and from other sources.

In January 1994, the newly elected mayor of Boston appointed Evelyn Riesenberg, formerly one of his special assistants, as the director of Boston Community Centers. Kevin Flynn was then the associate director of administration and finance; Randy Wolfson was one of two associate directors for field operations. In their later filed court papers, Flynn and Wolfson describe Riesenberg's reign in very unflattering terms.

In particular, they charge that from the outset, Riesenberg pressed Wolfson to tell her which senior staff members had worked for particular mayoral candidates; and Flynn says that Riesenberg asked him how she could fire the entire central office staff and replace them with her own supporters or those of the mayor. Both say that they argued with Riesenberg against this course of action.

They also say that Riesenberg sought, over their opposition, to appoint unqualified personnel to reward supporters of the

mayor, and they provide specific examples. Flynn says that Riesenberg ordered him to raise pay for a union worker in violation of the union contract. Flynn and Wolfson also say that Riesenberg mishandled several sexual harassment complaints and related personnel actions, despite their objections.

In August 1994, Riesenberg gave Flynn and Wolfson termination notices, asserting that she was reorganizing the agency. When they protested, the city's corporation counsel wrote to them that they were being discharged because of the reorganization and "an evaluation of their performance." Flynn and Wolfson in turn say that the reorganization was a sham and that neither of them has any negative evaluations in his or her personnel files.

After Flynn and Wolfson were fired, they brought suit in the district court against Riesenberg, the mayor, and the city. The plaintiffs sought declaratory and injunctive relief, and damages under 42 U.S.C. § 1983, on the ground that their First Amendment rights had been infringed; they also made statutory and common law claims based on state law. After discovery, the plaintiffs waived some claims, and the district court dismissed or granted summary judgment in favor of defendants on all of the remaining claims.

On summary dispositions, we take the facts and draw inferences in favor of the non-moving party. *Ortiz-Piñero v. Rivera-Arroyo*, 84 F.3d 7, 11 (1st Cir. 1996). But the question whether a position is subject to political discharge, or how far the First Amendment protects against having one's views considered in adverse personnel actions, are essentially legal questions for the court, even if they are close questions. *McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 93 (1st Cir. 1989).

Appendix A

From the outset of the Republic, government jobs have gone by political patronage, tempered now by civil service laws that afford varying degrees of protection, especially to lower level employees. *See Elrod v. Burns*, 427 U.S. 347, 377-79 (1976) (Powell, J., dissenting). To this accommodation, the Supreme Court about 25 years ago brought a new constitutional principle: that political firings by the government are allowed only in those jobs for which political loyalty is an "appropriate" criterion. *See Elrod v. Burns*, 427 U.S. 347, 372-73 (1976); *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

In response, the lower federal courts have tried to develop doctrine, but it is largely a porridge of general statements and variables: positions are less likely to be protected to the extent that they are "higher," more "political," more "confidential," and so on; duties prevail over titles; everything depends on circumstances. *See, e.g., Cordero v. De Jesus-Mendez*, 867 F.2d 1, 10-21 (1st Cir. 1989); *see also* 4 R.D. Rotunda & J.E. Nowak, *Constitutional Law: Substance and Procedure* § 20.42, at 272-75 (2d ed. 1992). To get any practical sense of where the lines have been drawn, one has to look at the results. *See Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241 (1st Cir. 1986) (en banc) (collecting cases), *cert. denied*, 481 U.S. 1014 (1987).

At least in the First Circuit, the cases have regularly upheld against First Amendment challenge the dismissal on political grounds of mid- or upper-level officials or employees who are significantly connected to policy-making. This result has followed where the plaintiff merely represented the agency's policy positions to other entities or to the public or where important personnel functions were part of the portfolio. *See, e.g., Cordero*, 867 F.2d at 11-12, 14. The common thread is that the officials or employees were policymakers or those who are in close working relationships with policymakers.

Thus, we have upheld political discharges of the regional director of an administrative agency, the municipal secretary in a mayor's office, an officer in charge of human resources, a director of public relations, a superintendent of public works, a director of a city's federal programs office, and a director of a satellite office of the Massachusetts Secretary of State.[1] Many such plaintiffs were subordinates within their own offices. Just one decision provisionally protected an official with a high-sounding title, but her duties were essentially technical. *See De Choudens v. Government Dev. Bank of Puerto Rico*, 801 F.2d 5, 9-10 (1st Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).[2]

By contrast, this court has disallowed political firings for a cleaning supervisor, a career employee administrative aide, and an auditor of books and records. *See Cordero*, 867 F.2d at 14-15, 16-18. The Supreme Court cases, granting or looking toward protection, have involved a floor supervisor, a guard, a process server, an assistant public defender, a rehabilitation counselor, a road equipment operator, a garage worker, and a dietary manager. *See Elrod*, 427 U.S. at 350-51, 372-73; *Branti*, 445 U.S. at 508, 519-20; *Rutan v. Republican Party*, 497 U.S. 62, 67, 76 (1990). Thus, it is primarily low-level jobs that have

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1. *See Jimenez Fuentes*, 807 F.2d at 246; *Cordero*, 867 F.2d at 10-12, 14; *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993); *Ortiz-Piñero v. Rivera-Arroyo*, 84 F.3d 7, 17 (1st Cir. 1996); *McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 96 (1st Cir. 1989).

2. *De Choudens* arose on interlocutory appeal, and this court did not decide that the official was protected but only that there was enough for a preliminary injunction. Later, in discussing *De Choudens*, this court made clear that an employee involved in technical matters might still be subject to political discharge on account of other duties (public litigation, advice) less technical in nature. *Nunez v. Izguierdo-Mora*, 834 F.2d 19 (1st Cir. 1997). *See also Goyco de Maldonado v. Rivera*, 849 F.2d 683 (1st Cir. 1988).

been protected, although this encompasses most workers in most agencies of government.

"Appropriate"—the test used in *Branti*—is an elastic concept, but we have an obligation to apply it consistently within the circuit. Under our prior decisions, Flynn is not protected. As associate director of administration and finance at Boston Community Centers, he had authority over human resource issues, supervision of the grants managers and personnel director, labor negotiations, and liaison responsibilities with a number of city or state agencies. *See Cordero*, 867 F.2d at 11-15; *cf. Goyco*, 849 F.2d at 685. These major responsibilities meant that policy disagreements with his politically appointed supervisor could lead to less effective implementation of political goals.

Wolfson is a closer case, but not by much—given the standards of prior cases. She was associate director for field operations and supervised about half the site coordinators, oversaw several programs, served as liaison with two city agencies, oriented new local council members, and monitored compliance with legal requirements. *Cf. Nunez*, 834 F.2d at 24. Like Flynn, Wolfson reported directly to the executive director of the agency and so represented top management in an agency with 400 employees.

The responsibilities of Flynn and Wolfson just described —and these are functions, not titles—obviously implicate policy. Indeed, they are the same kind of senior management functions that our earlier decisions have ascribed to a number of employees found to be subject to political discharge. For example, *Cordero*, 867 F.2d at 13-14, upheld the dismissal of a municipality's director of finance, whose primary tasks included supervision

of the accounting system, advising officials on fiscal matters, and supervising the disbursement of municipality funds. And in *McGurrin Ehrhard*, 867 F.2d at 93-95, we sustained the dismissal of the director of the Massachusetts Secretary of State's satellite office, whose job consisted essentially of providing information to citizens, "input" into personnel issues, and development of office policies.

Under our decisions, an employee is not immune from political firing merely because the employee stands apart from "partisan" politics, *see Mendez-Palou*, 813 F.2d at 1262-63, or is not the ultimate decisionmaker in the agency, *see McGurrin Ehrhard*, 867 F.2d at 95, or is guided in some of his or her functions by professional or technical standards, *see Cordero*, 867 F.2d at 13-14. Rather, it is enough that the official be involved in policy, *see Jimenez Fuentes*, 803 F.2d at 6, even if only as an adviser, implementer, or spokesperson, as Flynn and Wolfson certainly were. To hold Flynn and Wolfson to be protected would effectively depart from the main line of case law in this circuit.

One might ask why anyone, apart from elected officials, should be subject to "political" firing. The answer—this is folk wisdom, not mathematical proof—is that to implement their mandates, elected officials need a cadre of agency leaders and top subordinates responsive to the elected officials' goals. *See, e.g., Elrod*, 427 U.S. at 367. A rule effectively preventing the replacement of senior officials by new administrations would be a very serious step. A legislature can provide such tenure, but the Constitution does not command it.

None of this means that every "political" firing of a senior official is an act of good government. Indeed, if the allegations

of the complaint are true, and they are still only allegations, Flynn and Wolfson were public servants honestly resisting very dubious behavior by a superior. But the main remedy for mismanagement is elections. And officials who rise to the level of Flynn and Wolfson do so at the cost of any constitutional tenure protection against political discharge—unless and until the Supreme Court takes a different view and extends *Elrod* and *Branti* further.

A different, although related, issue is presented by the plaintiffs' alternative claim that they were fired "in retaliation" for protected speech. The legal standard in this area is notoriously fuzzy because the cases deal under the same head with very different problems and "justifications," for example, the disruptive employee, the whistle-blower who ignores channels, the official who disagrees about policy, the contractor who offers public political criticism of the agency, and so on.[3]

In the present case, we are not concerned with public expressions of political opposition or whistle-blower reports made publicly or within the agency but outside regular channels. Rather, the plaintiffs are policy level officials who disagreed with their superior on a number of policy and personnel issues before the agency and (quite properly, based on their allegations) expressed their disagreement to her. Although Riesenberg denies it, we must suppose (on summary judgment) that plaintiffs could prove at trial that these disagreements contributed to their firing.

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3. *See Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 564 (1968); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281-82 (1977); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-13 (1979); *Connick v. Myers*, 461 U.S. 138, 140-41 (1983); *Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 116 S. Ct. 2342, 2345 (1996); *O'Connor*, 994 F.2d at 911-18.

To this extent, the plaintiffs' expression of their views on issues played a role in their loss of position, and we will assume *arguendo* that the issues upon which Flynn and Wolfson expressed disagreement are the types of matters "of political, social, or other concern to the community" that the Supreme Court has said would trigger First Amendment analysis. *Connick*, 461 U.S. at 146. But expressing views on matters of public concern is only the first step in the Supreme Court's test for whether an employee is protected by the Constitution from being fired for expressing views.

The second step, vital here, is a balancing of the employee's interests "as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The Supreme Court has identified a number of state interests that might be impaired by an employee's statements (discipline, harmony among co-workers, interference with duties), but one such interest looms large here: the effect of the statements on those close working relationships for which personal loyalty and confidence are necessary . . . ." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

In *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), the District of Columbia Circuit addressed this type of justification in a situation somewhat akin to this case. In *Hall*, the University of the District of Columbia's athletic director was fired allegedly due to a disagreement between him and the university's president over the university's compliance with its own and NCAA rules. The court held initially that the athletic director's statements were about matters of public concern. It then moved to the second step, as we do in this case.

Appendix A

Recognizing that the Supreme Court had not yet squarely addressed the situation in free speech terms, the District of Columbia Circuit looked to the political patronage cases for help. 856 F.2d at 261-64. "Although not directly applicable, the patronage cases address similar concerns and recognize a government interest that is apposite here." *Id.* at 261. Ultimately, the court upheld that the right of the university president to insist on an athletic director who had compatible views on university matters, paralleling the political patronage cases. *See also DiMeglio v. Haines*, 45 F.3d 790, 805-06 (4th Cir. 1995).

No mechanical formula exists to resolve all cases where an employee is fired and the firing can be traced back in some causal way to "speech" by the employee. But we think it is a reasonable working rule that, where the employee is subject to discharge for political reasons under the *Elrod* and *Branti* cases, a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position. Indeed, without this congruence, the latitude allowed to the superior by the Supreme Court could be effectively nullified.

The issues about which Flynn and Wolfson spoke—and the speech to which they attribute their firings—related to the operation of the office (primarily to matters of hiring, firing and discipline). Yet it is issues of this kind, and the views of management employees about these issues, that are properly considered by the head of the office in deciding who is best suited to be her direct subordinates. Precisely because Flynn and Wolfson's "speech" did bear on the job and on their working relationship with Riesenberg, Riesenberg was permitted to conclude reasonably that she did not have the necessary trust and confidence to retain them.

In this context, it does not make any difference that Flynn and Wolfson may have been "right," and Riesenberg wrong in the positions urged or taken. A jury might easily be confused on this point, thinking that a junior official should be praised and not fired for giving sound advice. But staffing the senior levels of a city agency is the business of the mayor and his appointees, responsible in turn to the electorate, unless a legislature says otherwise.

This does not mean that anything goes for policy-related positions: this would be a different case if an executive were fired for reporting a crime or fraud or for expressing adherence to one church or another. *Compare O'Connor*, 994 F.2d at 915-16. So, too, the situation would be different if a clerical worker, in a non-disruptive and otherwise proper manner, disagreed about how the agency was doing its job. If the employee were not at a policy level, it might be hard to see why such criticism would be pertinent to retention.

Further, the lack of a First Amendment claim does not mean that the plaintiffs are without remedy. The district court dismissed plaintiffs' state-law counts for wrongful discharge and related misconduct, and plaintiffs have appealed. But absent federal claims, it is not clear why either this court or the district court should be drawn into issues that involve the construction of state statutes and of state common law as applied to regulate the personnel actions of a local governmental unit.

The only jurisdiction in the district court over the state claims was pendent, and the federal claims were dismissed before trial. Given the subject matter, there is special reason why state judges should referee disagreements about whether and when state or local officials may be fired. *Cf. Pyle v. South Hadley*

Sch. Comm., 55 F.3d 20, 22 (1st Cir. 1995). Where this is so, and where as here there are few economies in a federal court resolution, the better course is ordinarily to dismiss the state claims without prejudice and leave them to local courts. *Cf. Carnegie-Mellon Univ. v. Cahill*, 484 U.S. 343, 350 (1988).

For the foregoing reasons, the district court's grant of summary judgment in favor of the defendants on the federal claims is *affirmed*, the district court's grant of summary judgment in favor of the defendants on the state-law claims is *vacated*, and the case is *remanded* for dismissal of the state-law claims without prejudice. Each side shall bear its own costs on this appeal.

It is so ordered.

Dissent follows.

JOHN R. GIBSON, *Senior Circuit Judge*, dissenting. I respectfully dissent. In my view, the court today focuses on job title and place in the organizational hierarchy to decide whether a position is subject to a political affiliation requirement. The majority measures the distance from Wolfson and Flynn to Reisenberg, a policymaker, to determine whether their jobs are political. Although job title and position are certainly relevant to decide whether a position is political, the court's inquiry does not square with the inquiries directed by the Supreme Court in *Branti v. Finkel*, 445 U.S. 507, 518 (1980), or this court in *O'Connor v. Steeves*, 994 F.2d 905, 910 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993), which require a close examination of the overall functions of the employee's department, as well as the particular responsibilities of the position.

Indeed, we have emphasized that the appropriateness of making political affiliation a job requirement is not solely determined by either agency hierarchy or the scope of job duties. "Regardless of the position of an employee within the government hierarchy, or the broad scope of his or her duties, if the employee is responsible only for duties that are measured solely by strictly technical or professional criteria, the job is nonpartisan in nature and not properly a target of patronage dismissal." *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987).

The court today avoids the significance of our en banc decision in *De Choudens v. Government Development Bank of Puerto Rico*, 801 F.2d 5 (1st Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).[4] *De Choudens*, a companion case to *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (en banc), *cert. denied*, 481 U.S. 1014 (1987), nonetheless, is controlling. De Choudens had been Senior Vice-President of Finance at the Puerto Rico Government Development Bank, one of three vice presidents serving under the president and executive vice president. *Id.* at 6. The bank's primary functions were to act as fiscal agent and financial advisor to the Commonwealth of Puerto Rico, its governor, and political subdivisions; lender to government and private industry; and depository of Commonwealth funds. *Id.* at 8. De Choudens

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4. While *De Choudens* granted a preliminary injunction, the only limitation to its ruling is that later development of the record for a permanent injunction could cause a different result if we found "a sufficient nexus" between the position and "policy relating to partisan concerns." 801 F.2d at 10. The cases cited by the court have uniformly endorsed *De Choudens*, only finding it distinguishable on its facts. *See, e.g., Nunez v. Izquierdo-Mora*, 834 F.2d 19, 23-25 (1st Cir. 1987); *Goyco de Maldonado v. Rivera*, 849 F.2d 683, 685-86 (1st Cir. 1988).

claimed that she was demoted because of her political affiliation, and we affirmed the district court's order reinstating her.

We held that the bank had "indicia of legitimate partisan goals for government operations, not far removed from some of the policy objectives of [the agency] discussed in *Jiminez Fuentes*." *Id.* at 8. Unlike *Jiminez Fuentes*, however, we concluded that De Chouden's job position did not justify a political affiliation requirement. She was a "staff official who, while indubitably in a policymaking, confidential, and communicative position, is both empowered and constrained by the limits of her specialized functions." *Id.* at 9. Unlike the department in *Jiminez Fuentes*, "her division [was] not a microcosm of the larger agency." *Id.* The government emphasized her broad discretion in rule-making, reorganization, accounting policy, investment strategy, and budget and personnel recommendations, but we found the need for political affiliation lacking:

> While these responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice, they involve *politically-neutral, technical, and professional matters.* Similarly, though plaintiff was indeed an agency spokesperson, there is *no suggestion of any "party line" or political, goal-oriented message that she ever communicated.*

Id. (emphasis added).

The court today gives only brief consideration to the tasks required of Flynn and Wolfson. The court does not focus on whether Flynn's and Wolfson's duties are "politically-neutral,"

"technical," or "professional," *De Choudens*, 801 F.2d at 9, or whether their duties are those of a "policy maker, privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *O'Connor*, 994 F.2d at 910. Nor does the court consider factors relevant to this determination such as "relative pay, technical competence, power to control others, authority to speak in the name of policy-makers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders." *Jimenez Fuentes*, 807 F.2d at 242.

Wolfson, as Associate Director for Field Operations, has described her job as:

> overseeing the operations at 20 Community centers, including recreation, aquatics, programming, personnel, and budgets, monitoring the various programs of the [Boston Community Centers] for compliance with municipal, state, and federal regulations, providing technical assistance to the non-profit corporate arms of the centers, writing of the operational and non-profit fiscal compliance manuals for the agency, and supervision of capital improvements, maintenance, and repairs.

The City submitted a written job description[5] for Wolfson's

5. Wolfson contends that this description was not the official description when she was employed by the Central Office. The district court relied on Wolfson's deposition testimony describing her position, and did not rely on this description. Nevertheless, I have reviewed the description and believe it is largely consistent with Wolfson's testimony describing her job. Flynn and

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position. The description provided that the Associate Director "shall, under the Director . . . oversee the daily operations of the Boston Community Schools & Recreation Centers Program." The responsibilities included: monitoring, supervising, and assisting the coordinators; assisting in the governance process as it applies to the formation of new councils; facilitating referral and support networks between local operations; providing technical assistance in the recruitment and hirings of coordinators; and giving orientation and supervision to coordinators during the initial ninety days of employment.

Viewing the evidence in the light most favorable to Wolfson, I do not believe that party affiliation is an appropriate job requirement for her position. The focus of her responsibilities was community center operations, and she was involved in "hands-on," day-to-day operations. Wolfson was responsible for operational concerns such as recreational programs, program personnel and budgeting, maintenance and capital improvements, and compliance with applicable regulations. She testified in her deposition that she oversaw the Boston Neighborhood Basketball League and supervised the aquatics directors for the pools. She explained that she worked with the advisory board and councils for the community centers, and her role was to ensure compliance with the plan of operations. Political party goals do not play a role in these aspects of operations. Rather, her specialized job responsibilities involved "politically-neutral, technical, and professional matters." *De Choudens*, 801 F.2d at 9. *See Cordero v. DeJesus-Mendez*, 867

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Wolfson also attached to their affidavits job descriptions contained in the Operations Manual for the Boston Community Centers. The district court, however, struck these affidavits, which were submitted after the close of discovery.

F.2d 1, 14-15 (1st Cir. 1989). Although Wolfson had a connection to some policy-making functions, her specialized functions did not create or impact any policies of the department. *See De Choudens*, 801 F.2d at 6. There is no doubt that Wolfson occupied an important position with the Boston Community Centers, however, there is no evidence that her position allowed her to make partisan decisions, nor is there any suggestion that she ever communicated any political message. *See De Choudens*, 801 F.2d at 9. *Cf. Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988) ("highly visible spokesman"). Political affiliation is not an appropriate job requirement.

Similarly, Flynn describes his job responsibilities as including the:

> oversight of all finance and personnel functions within the [Boston Community Centers], preparation and implementation of the department budget, supervision of state, federal, and private grants management, management of the agency's payroll and contract functions, providing fiscal, legal, and personnel assistance to the non-profit corporate arms of the centers liaison to the city's law department, labor relations, and federal agencies.

Flynn's written job description[6] describes Flynn's duties as: planning and evaluating administrative procedures for the programs; developing analytical models for use in the

6. Like Wolfson, Flynn contends that this was not the official job description when he was employed by the Central Office. The district court did not rely on this description, but on Flynn's deposition testimony. Nevertheless, the description appears to be, in many respects, consistent with Flynn's description of his job.

evaluations; preparing statistical reports and working with others to evaluate the data; and developing procedural guidelines for appropriate staff.

I agree that reviewing Flynn's political affiliation claim is a closer question than Wolfson's because Flynn's position was more closely involved with policy formulation and confidential information at the Central Office. Nevertheless, viewing the evidence in the light most favorable to Flynn, as we are required to in the appeal from summary judgment, I believe that his position did not concern partisan political interests. Flynn's position lacked the capabilities of influencing political goals. His affidavit states that he "never worked with the Mayor's office to establish goals and objectives . . . but only to find out what the goals and objectives were." Flynn explained in his deposition that "[t]he largest political policy issues would be dealt with [sic] the executive director." Although Flynn was in charge of preparing the department budget, his deposition clarifies that he prepared the budget following the directives from the mayor and executive director. Flynn's responsibilities seem quite similar to those in *Fontane-Rexach v. Puerto Rico Electric Power Authority*, 878 F.2d 1493, 1495, 1500 (1st Cir. 1988), in which we noted that although the supply officer would not always approach his job in a uniform way, it was improbable that his decisions would involve partisan political goals. *Id.* at 1496. Likewise, Flynn's job duties were largely limited to the technical and specialized aspects of finance and budgeting, and his duties beyond those areas carried only a limited potential for influencing political goals. As in *De Choudens*, Flynn was essentially a staff official with specialized knowledge, and "although his position involved policy-making, the reposing of confidence, and communicating," such functions were "remote from advancing or thwarting the agency's partisan-responsive

goals." *See* 801 F.2d at 6. Accordingly, political affiliation is not an appropriate requirement.

I believe that Flynn and Wolfson have presented evidence sufficient to survive summary judgment on their claim that they were terminated from their jobs because of their lack of political affiliation with the Mayor. Accordingly, I would reverse the district court's judgment on this issue.

Because I conclude that Flynn's and Wolfson's positions are not political positions, I also part company with the court's view that they have no First Amendment claim.

Flynn's and Wolfson's objections to Riesenberg's handling of certain sexual harassment claims constitute a matter of legitimate public concern. The allegations bear on Riesenberg's fitness to serve as Executive Director, similar to the public concern we identified in *O'Connor*. *See* 994 F.2d at 915. Because such statements concern a topic which is a matter of inherent concern to the public, we need not examine plaintiffs' personal motivations for speaking out. *Id.* at 915.

I concede that the employees' objections to Riesenberg about personnel practices present a more difficult circumstance. In *Connick v. Myers*, 461 U.S. 138 (1983), the Court considered a questionnaire circulated by an assistant district attorney, inquiring about matters such as the office's transfer policy, office morale and the level of confidence in supervisors. *Id.* at 141. The Court concluded that this speech related only to internal office policy and did not touch upon matters of public concern.[7] *Id.* at 154.

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7. The questionnaire did touch upon one matter of public concern — pressure on employees to work in political campaigns — but the Court (Cont'd)

Compared to the speech in *Connick*, however, the complaints of Flynn and Wolfson about office policies and procedures touch upon matters more likely to be of public concern, i.e., whether the city based personnel decisions on political alliances without regard to qualifications. Because this speech does not necessarily qualify on its face as a matter of public concern, we must examine its context more fully. *See O'Connor*, 994 F.2d at 914. Unlike the statement in *Connick*, the statements at issue were not made *after* the adverse employment decision, thus suggesting retaliation, and were not directly related to the plaintiffs' own employment situation. *See* 461 U.S. at 148. While this is a close issue, I am convinced that the employees' evidence is sufficient to survive summary judgment. Personnel decisions based on political affiliation are much more than an individual employee's grievance against his employer. *See Connick*, 461 U.S. at 148. I do not address the second and third steps of the *O'Connor* analysis (balancing of interests and consideration of motivations for plaintiffs' terminations) because the district court did not reach those issues. *See* 994 F.2d at 912-13. I would only hold that the employees have raised a genuine factual issue as to whether they engaged in speech concerning a matter of public concern protected by the First Amendment.

Finally, I would also allow Flynn and Wolfson to assert their pendent state law claims for wrongful termination. The district court decided that a "whistleblowing" employee may be entitled to public protection under Massachusetts law. Nevertheless, the court granted summary judgment in the city's

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examined the circumstances of the plaintiff's circulation of her questionnaire and concluded that it was "most accurately characterized as an employee grievance concerning internal office policy." 461 U.S. at 154.

favor on the wrongful termination claim because of its ruling that the employees' speech criticizing Riesenberg's decision did not constitute whistleblowing. I have reached a contrary conclusion as to the public nature of the speech in question and, therefore, I would conclude that there is a genuine issue of material fact as to whether the speech at issue falls within the public policy exception. *See GTE Products Corp. v. Stewart*, 653 N.E.2d 161, 164-65 (Mass. 1995).

I would reverse the district court's judgment.

APPENDIX B — MEMORANDUM AND DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED NOVEMBER 5, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 94-11743-RGS

KEVIN N. FLYNN AND RANDY WOLFSON

Plaintiffs

v.

THOMAS MENINO, CITY OF BOSTON (BOSTON COMMUNITY CENTERS), AND EVELYN RIESENBERG

Defendants

MEMORANDUM AND DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

November 5, 1996

STEARNS, District Judge.

Plaintiffs Kevin Flynn and Randy Wolfson are suing the City of Boston, its Mayor, Thomas Menino,[1] and Evelyn Riesenberg, the Executive Director of Boston Community Centers (BCC), a City agency. Flynn and Wolfson allege that they were fired from senior positions at BCC for want of dedication to the

1. Mayor Menino is named in both his official and personal capacities.

Mayor's political interests. Flynn and Wolfson claim that defendants violated their First Amendment rights to free speech and association. They seek declaratory and injunctive relief, money damages, and attorney's fees.

Before the court are defendants' motions for summary judgment on the surviving counts of the Amended Complaint.[2] The defendants claim, in individual motions, that the plaintiffs are unable to demonstrate that protected speech played a determining part in their terminations or that their jobs were protected by the First Amendment.

FACTS

The material facts, construed in the light most flattering to the plaintiffs, are these. Flynn and Wolfson were senior employees of BCC. Flynn served as the Associate Director for Administration and Finance. Flynn's responsibilities included

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2. On December 4, 1994, Flynn and Wolfson filed an Amended Complaint consisting of the following counts: Count I—declaratory and injunctive relief under the First Amendment against the City of Boston and Mayor Menino; Count II—declaratory and injunctive relief under the First Amendment against Riesenberg; Count III—mandamus against all defendants; Count IV—42 U.S.C. § 1983, all defendants individually; Count V—M. G.L. c. 12, § 11I, all defendants individually; Count VI—wrongful termination, all defendants; and Count VII—intentional infliction of emotional distress, Riesenberg. After a hearing, the court dismissed Counts III and V of the Amended Complaint and denied the motion with respect to Counts I, II, IV, VI and VII. The court held that despite the larger remedies of 42 U.S.C. § 1983, plaintiffs might have a plausible argument that they were entitled to injunctive and declaratory relief, if not monetary damages, in an action brought directly under the First Amendment. In response, plaintiffs waived any claim for money damages under Counts I and II. Later, the parties stipulated to dismissal with prejudice of Count VII of the Amended Complaint.

oversight of BCC financial and personnel matters. Wolfson served as Associate Director of Field Services. Wolfson oversaw the operations of twenty community centers. Both Flynn and Wolfson reported directly to BCC's Executive Director. Flynn and Wolfson did not endorse or campaign for any candidate for Mayor during the 1993 mayoral campaign.

In January, 1994, after winning election as Mayor, Menino appointed Riesenberg, one of his special assistants, as Executive Director of BCC. Upon assuming her new duties, Riesenberg asked Wolfson to gather information on the political loyalties of BCC employees. Amended Complaint, ¶ 19; Wolfson Dep., at 238-241. Riesenberg also asked Flynn how she could fire the entire staff and replace them with her own or the Mayor's people.[3] Flynn Dep., at 231. One of Riesenberg's first acts as Executive Director was to hire Charles Clabaugh, a Menino precinct captain, as her Special Assistant. Riesenberg hired Clabaugh without requiring him to submit a resume or a City of Boston employment application. Riesenberg Dep. I, at 56-59.[4] Riesenberg became angry when Wolfson and an interview committee rejected an applicant for an athletic director's position backed by the Mayor. Wolfson Dep., at 152-157.[5] Riesenberg hired the candidate nonetheless, although for a position with

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3. Riesenberg denies making either of these requests.

4. Plaintiffs do not claim to have voiced an objection to Riesenberg's decision to hire Clabaugh.

5. Wolfson and Flynn cite two other instances where Riesenberg either hired or offered a job to a person whom they deemed unqualified. See Flynn Dep., at 158-160; Wolfson Dep., at 246-250. Flynn acknowledges that he has no knowledge of the political affiliations of any of the persons Riesenberg hired. Flynn Dep., at 135, 138, 141. Nor does he know of any person rejected for employment because of their political affiliation. Flynn Dep., at 144-145. Wolfson identifies three persons whom she claims were hired because of their political affiliation. Wolfson Dep., at 171, 174, 182-183.

less responsibility. Wolfson Dep., at 158. Wolfson states that she overheard Riesenberg order Clabaugh not to interview an applicant who might have supported one of the Mayor's opponents. Wolfson Dep., at 250-251.[6]

Shortly after Riesenberg arrived at BCC, Flynn and Wolfson briefed her on a sexual harassment complaint previously filed by a female employee against her supervisor. Wolfson Dep., at 326-327. According to Flynn, the alleged offender had served as a ward coordinator in Menino's mayoral campaign. Flynn Dep., at 173. Wolfson recommended that the complainant be supervised by someone else. According to Wolfson, Riesenberg replied that the "woman couldn't have [her] position if she couldn't be supervised by him" and "suggested that [she] be moved into a different position." Wolfson Dep., at 327-328. Plaintiffs told Riesenberg that the supervisor had failed to reveal on his employment application that he was on probation for selling drugs, and that Riesenberg's predecessor had not handled the case "appropriately."[7] Wolfson Dep., at 330. The plaintiffs also informed Riesenberg of an allegation that the same supervisor had been observed using drugs in a city vehicle, a matter they thought should be investigated. Riesenberg's response was "noncommittal." Wolfson Dep., at 331. Riesenberg suggested that Wolfson might have a "personality conflict" with the man. Id. Wolfson states that Riesenberg "effectively excluded her from [further] involvement in the matter." Plaintiff's Opposition at 8. Some time thereafter, Riesenberg relieved Flynn of oversight of sexual harassment matters.[8] Clabaugh assumed Flynn's duties in this regard. Clabaugh Dep., at 148.

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6. Wolfson did not raise an objection to Riesenberg's directive.

7. Plaintiffs acknowledge that the supervisor had been suspended for this infraction. Wolfson Dep., at 329.

8. Flynn did not voice any objection. Flynn Dep., at 172. In their

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Appendix B

One month after Riesenberg's appointment, she ordered Flynn to process a pay raise for a union employee. Flynn objected on grounds that to do so would contravene the terms of a collective bargaining agreement. Flynn Dep., at 149- 153. Flynn also objected to Riesenberg's decision to hire a second person on a federal grant when Flynn believed that only one was authorized. Flynn Dep., at 133. In late July of 1994, Riesenberg gave both Flynn and Wolfson termination notices, citing plans to reorganize BCC. On August 12, 1994, the plaintiffs, through counsel, delivered a letter to Mayor Menino notifying him of Riesenberg's actions and demanding that he countermand their impending dismissal. The Mayor referred the letter to the City's Corporation Counsel, who, in a reply dated August 19, 1994, rejected the plaintiffs' demand. In his letter, the Corporation Counsel attributed plaintiffs' discharge to a "reorganization within the Boston Community Centers and an evaluation of their performance." The letter was, plaintiffs allege, a "cover-up" for the unconstitutional actions taken against them and an affirmation of the policy of the Mayor and

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Supplemental Memorandum, at 3, plaintiffs claim that in a second case that had been concluded before her arrival, Riesenberg, over plaintiffs' objections, modified the punishment recommended by the City's affirmative action office for a politically connected employee who had been accused of harassment by two women. There is nothing, however, in the record presented by the plaintiffs to support this claim. Flynn merely states that the two women were dissatisfied with the outcome. Flynn Dep., at 178. *Compare* Riesenberg Dep. II, at 21-22, cited by the plaintiffs, where Riesenberg states that she followed all of the steps that had been recommended by the City personnel department. Although it is unclear which incident is being discussed in the transcript, assuming it is this one, at most Riesenberg asked that one recommendation be modified to permit it to be carried out by her Deputy Director, rather than the Associate Director in charge of the facility where the offender was working. Riesenberg Dep. I, at 171-172.

the City "to make political service a condition of employment." Amended Complaint, ¶ 35. The plaintiffs were fired on August 19, 1994, and filed this lawsuit on August 30, 1994.

DISCUSSION

Summary judgment is appropriate when, based upon pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Gaskell v. Harvard Co-op. Soc.*, 3 F.3d 495, 497 (1st Cir.1993). A material fact is one which has "the potential to affect the outcome of the suit under the applicable law." *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir.1993). In considering the admissible evidence provided to the court, the non-moving party is indulged with all favorable inferences. *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 105 (1st Cir.1988).

PART A

Counts I and II of the Amended Complaint are based on alleged violations of the First and Fourteenth Amendments to the United States Constitution. In these counts, plaintiffs seek declaratory and injunctive relief (specifically reinstatement to their jobs and a court declaration of their right to be free from retaliation for protected activity). The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, prohibits the dismissal of a public employee based solely upon his or her refusal to give support to the political party in power, unless political affiliation is an appropriate requirement of the employee's job. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689-2690, 49 L.Ed.2d 547 (1976). The First Amendment also enjoins the dismissal of

a public employee in a non-policy making position solely because of his or her political affiliation or lack of political sponsorship. *Branti v. Finkel*, 445 U.S. 507, 516-517, 100 S.Ct. 1287, 1293-1294, 63 L.Ed.2d 574 (1980). *See also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (extending the *Elrod-Branti* rule to applicants for public employment). And finally, the First Amendment forbids the discharge of a public employee solely for the exercise of his or her right to criticize, publicly or privately, the policies of the party in power. *Perry v. Sindermann*, 408 U.S. 593, 597-598, 92 S.Ct. 2694, 2697-2698, 33 L.Ed.2d 570 (1972).

The plaintiffs, to prevail on these counts, must produce sufficient evidence of a direct or circumstantial nature that either partisanship or retaliation for protected speech (or both) was a substantial or motivating factor in their dismissals. *See Jirau-Bernal v. Agrait*, 37 F.3d 1, 3 (1st Cir.1994); *Anthony v. Sundlun*, 952 F.2d 603, 605 (1st Cir.1991). If plaintiffs surmount this threshold, the burden then shifts to defendants to prove by a preponderance of the evidence that plaintiffs either held positions for which partisan affiliation was an appropriate requirement, or that plaintiffs would have been dismissed in any event for permissible reasons. *Mt. Healthy City School District Board of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Wytrwal v. Saco School Bd.*, 70 F.3d 165, 170 (1st Cir.1995); *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 66 (1st Cir.1993).[9]

As for the political affiliation contention, the partisan statements attributed by the plaintiffs to Riesenberg are sufficient

9. The same burdens apply to plaintiffs' claims under 42 U.S.C. § 1983 which are also based on the First and Fourteenth Amendments.

for present purposes to support an inference that they were fired because they were perceived as insufficiently loyal to the Menino regime. Without conceding the ultimate point, defendants offer evidence that plaintiffs' positions in City government were at a sufficiently high level to make political loyalty a legitimate criterion of their tenure.[10]

Although fact-intensive, the determination whether a government position is "political" is a matter of law to be decided by the court. *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 12 (1st Cir.1996). A common consideration is to ask whether an employee occupies a position of trust, although the answer to that question is not dispositive. "Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. . . . In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. at 518, 100 S.Ct. at 1294.

In searching out the contours that define a "political post," we look to the substance of the duties inherent in an employee's position. *Ortiz-Pinero*, 84 F.3d at 12. We ask first whether the

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10. The City also maintains that plaintiffs would have been fired in any event as part of a plan to reorganize BCC. In support, the City offers the affidavits of Patricia Brainard and Janice Hamilton, Associate Directors of BCC and Menino supporters, who lost their jobs at BCC at the same time as did the plaintiffs. The City also offers the deposition testimony of Ophelia Mencey, BCC's Personnel Director, that a consolidation of positions at BCC was undertaken by Riesenberg in the summer of 1994, and the testimony of Charles Clabaugh to the same effect.

overall functions of the employee's department or agency involve "decisionmaking on issues where there is room for political disagreement on goals or their implementation? . . . [T]he next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-242 (1st Cir.1986) (en banc). Some relevant factors in the policymaking determination include "relative pay, technical competence, power to control others, authority to speak in the name of policy-makers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders." *Id.* at 242 (quoting *Ecker v. Cohalan*, 542 F.Supp. 896, 901 (E.D.N.Y.1982)).[11]

Often dispositive is a plaintiff's own testimony regarding his or her actual job duties. *Jimenez Fuentes*, 807 F.2d at 244-245; *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir.1993). Plaintiffs describe BCC in their Amended Complaint as "an official agency of the City of Boston, composed of [forty one] community centers throughout the city, which implement recreational, educational, senior, child care, youth work and other community programs. . . . [T]he BCC has an approximate total of 400 employees and a total budget of some $15 Million." Amended Complaint, ¶ 6. Flynn served as BCC's Associate Director for Administration and Finance. His responsibilities included "oversight of all finance and personnel functions within the BCC, preparation and implementation of the department budget, supervision of state, federal and private grant

11. *Jimenez Fuentes*, 807 F.2d at 241, includes a useful compilation of governmental positions that have been found subject to political dismissal.

management, management of the agency's payroll and contract functions, providing fiscal, legal and personnel assistance to the non-profit corporate arms of the centers," and direct liaison to many City departments including the Law Department, Budget and Audit Departments, Management Information Systems, and Labor Relations, as well as to various state and federal agencies.[12]

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12. In describing his responsibilities for preparation of BCC's budget, Flynn testified that "the preparation of the budget is about a four-month project. It would require establishing a budget committee through local—the boards, working with the treasurer of the Citywide Board and a panel of usually a dozen people in the budget preparation. It would require working with the Mayor's office for the goals and objectives of the coming year. It would require briefings with the Budget Department, requiring input regarding the City Council hearings. It used to mean meeting with the chairman of the [Legislature's] Ways and Means Committee." Flynn Dep., at 52.

Flynn described his duties as liaison to the Law Department as "[i]n any event that there was a legal problem, such as an attorney calling, a suit being filed against the community centers, a 51A, any legal problem with the staff, I would assist the field staff or central office staff would come to me and explain the problem. At that point I would call the attorney who was assigned to our department, explain the situation, and then take the lead from the City's attorney on how to pursue it. Most of what I would do would be to gather information, make sure that things were properly documented, represent people from community centers to the Law Department, essentially bring them over. In the event that a court hearing was necessary, I would usually attend. If we had a case before the MCAD, I would be the person from Boston Community Schools to attend. With State Labor Relations if we had a problem, I would be the one to attend. If we had to go to court on a negligence suit, I would represent the department I believe as the key person, as the keeper of records as well. If we had a particularly violent incident that resulted in a family or an organization suing the department, I would be the information gatherer and work with the City attorneys to represent the City in that case." Flynn Dep., at 42-43.

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Amended Complaint, ¶ 10; Flynn Dep., at 41-49. Additionally, Flynn worked with the offices of the Massachusetts Attorney General and the Massachusetts Secretary of State in establishing local councils as non-profit entities.[13] Flynn also monitored BCC's Personnel Department in its handling of sexual harassment complaints. Amended Complaint, ¶ 29. Flynn reported to Riesenberg. Flynn Dep., at 37.

According to his testimony, Flynn performed duties at BCC that entailed policymaking, representational activities, ministerial duties, and personnel oversight. *See Jimenez Fuentes*, 807 F.2d at 244; O'Connor, 994 F.2d at 911 (1st Cir.1993). In reporting directly to BCC's Executive Director, and as a liaison to various City departments, Flynn was privy to confidential information. As an Associate Director with oversight of a $15 million plus budget and as the Executive Director's designee for hirings, purchasing and expenditures, Flynn proposed, established, and implemented City policy. Flynn frequently represented BCC and its affiliates in dealings with other City agencies, and departments, state and federal agencies, and private businesses and individuals. Flynn, in other words, played a sufficiently

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With regard to the Labor Relations Department, when the community schools' senior staff began to unionize, Flynn "was appointed the lead negotiator for the labor relations." Flynn Dep., at 44.

13. Flynn testified that as an Associate Director of the BCC, he assisted local non-profit organizations administratively and in raising independent funds, and oversaw all finance and personnel decisions. "Essentially if any transaction was going to be made either financially or through personnel, it would go to the comptroller, the grants manager, or the personnel director who worked for me. So essentially I would be the sign-off on all of their work. It would include the hiring of individuals, the purchasing of goods, the expenditures of funds." Flynn Dep., at 47-48.

important role at BCC and within City government to make his position one for which political affiliation was an appropriate requirement. *Jimenez Fuentes*, 807 F.2d at 245.[14]

Wolfson served as BCC's Associate Director of Field Services. Wolfson's responsibilities included "overseeing the operations at twenty community centers, including recreation, aquatics, programming, personnel, and budgets, monitoring the various programs of the BCC for compliance with municipal, state and federal regulations, providing technical assistance to the non-profit corporate arms of the centers, writing of the operational and non-profit fiscal compliance manuals for the agency, and supervision of capital improvements, maintenance, and repairs."[15] Amended Complaint, ¶ 11. Wolfson also reported to Riesenberg. Wolfson Dep., at 60.

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14. After the close of discovery, and after defendants had filed their motions for summary judgment, plaintiffs attempted to file affidavits contradicting significant portions of their deposition testimony, particularly those portions elaborating on the responsibilities of their respective positions. The court has allowed defendants' motion to strike these affidavits. *See Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir.1994). I have not relied on the City's official descriptions of the plaintiffs' jobs which they claim the affidavits are intended to rebut. I have relied rather on the plaintiffs' own deposition testimony.

15. Wolfson testified that her specific duties included supervision of site coordinators, the Boston Neighborhood Basketball League and Aquatics Program, overseeing ten local councils, and the associated fifteen sites where those councils operated. In her responsibility for these sites, Wolfson was liaison between the BCC and the City of Boston's Public Facilities Department and the Real Property Department. Wolfson Dep., at 41-42. "I worked with the councils, I did orientation for the new members as requested. I worked in forming new advisory boards and councils for new sites . . . In

(Cont'd)

Wolfson, like Flynn, because of her reporting relationship, was privy to confidential information. While her duties were somewhat less broad than Flynn's, she had the greater interaction with the public. In that capacity, she had the authority to speak in the name of City policymakers. She handled matters that were "potentially subject to partisan political differences" and her job "involved at least a modicum of policymaking responsibility." *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258, 1259 (1st Cir.1987). Her position, like Flynn's, was thus fairly subject to a political test.

PART B

Flynn and Wolfson's second contention, that they were fired in retaliation for the exercise of their First Amendment right of free speech, requires separate analysis. A public employer may not, as a rule, dismiss an employee simply because it disapproves of what the employee says, either in public or in private. *Perry*, 408 U.S. at 597-598, 92 S.Ct. at 2697-2698. *See also Bd. of*

(Cont'd)
my job I was sort of an expert on nonprofit management, because I had a background in that. I put together a book which I felt was necessary, Financial Management of Nonprofits for Boston Community Schools." Wolfson Dep., at 43-44. Wolfson drafted a manual for BCC, an orientation packet for council members, and a transition report when Menino became mayor that included a program profile for BCC. *See* Wolfson Dep., at 42-44.

While Wolfson had no authority to terminate individual board members, "I did have an ability working with the director and the senior staff to deal with the board in total that wasn't in compliance. So it wasn't an individual process, it was an overall process." Wolfson Dep., at 51. Wolfson would also recruit and present candidates for employment, and on some occasions would recommend finalists to the Executive Director after she had screened and interviewed applicants. *See* Wolfson Dep., at 63-65.

Cty. Com'rs., Wabaunsee County v. Umbehr, — U.S. —, —, 116 S.Ct. 2342, 2352, 135 L.Ed.2d 843 (1996). *Cf. O'Hare Truck Service, Inc. v. City of Northlake*, — U.S. —, —, 116 S.Ct. 2353, 2361, 135 L.Ed.2d 874 (1996). The First Amendment rights of public employees are not, however, absolute. If they were, a public employee could confer tenure on himself by opportunistic denunciations of his employer's policies. Rather,

> [g]overnment employees' First Amendment rights depend on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering [v. Board of Ed. of Township High School Dist. 205, Will Cty.]*, 391 U.S. [563, 568 [88 S.Ct. 1731,1734-1735, 20 L.Ed.2d 811] (1968)]. In striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."

Umbehr, — U.S. at — - —, 116 S.Ct. at 2347-2348 (citations omitted).

Drawing a First Amendment line between what is and what is not protected speech in a government office is not an easy

task. The "practical realities of government employment" justify many restrictions on speech that would be intolerable if imposed by the State on the public at-large. *Waters v. Churchill*, 511 U.S. 661, —, 114 S.Ct. 1878, 1886, 128 L.Ed.2d 686 (1994). "[T]hough a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." *Id.* The public interest in the efficient delivery of government services is served by minimizing disruption in the government workplace. Consequently, we give deference to government predictions of harm even where unwelcome speech involves no "tangible, present interference with [an] agency's operation." *Id.* at —, 114 S.Ct. at 1887. This deference, however, is not meant to be dismissive of First Amendment concerns.

> One could make a respectable argument that political activity by government employees is generally not harmful, or that high officials should allow more public dissent by their subordinates, or that even in a government workplace the free market of ideas is superior to a command economy. But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.
>
> • • •
>
> The restrictions discussed above are allowed not just because the speech interferes with the government's

> operation. Speech by private people can do the same, but this does not allow the government to suppress it. Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Id. at —, — - —, 114 S.Ct. at 1887, 1887-1888 (citations omitted).

In addition to promoting efficiency, government has a legitimate concern that dissident statements by high-ranking officials might be confused with statements of its own positions, thereby undermining the legitimacy of government in the eyes of the public. *Umbehr*, — U.S. at —, 116 S.Ct. at 2350. And finally, the public and the government share an interest in securing the ability of government to fulfill its electoral promises. One of the ways this is accomplished is through political appointments.

Appendix B

> [R]epresentative government needs a certain amount of leeway for partisan selection of agents in order to work. These agents may be policymakers, confidential employees, or others for whom party affiliation is an equally "appropriate" requirement. Appropriateness is, we think, a corollary to our system of determining the direction of governmental entities by the popular election of top office holders who have taken or are considered to have taken positions on one or more issues during a campaign. In order for the new administration to be given an opportunity to fulfill expectations, it must have available and also appear to have available significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance. The presence of such persons advances the goals of representative government; their absence, in Elrod's term, "undercut[s]" such government.

Jimenez Fuentes, 807 F.2d at 241 (citing [*Elrod*], 427 U.S. at 367, 96 S.Ct. at 2686-2687). Voters, in other words, should be able to expect that their choices at the ballot box will be reflected in the policies of those whom they elect. This is only possible if elected leaders have the freedom to staff the upper ranks of their administrations with persons loyal to the measures they espouse.

But experience with government scandals, and the enactment of so-called "whistleblower" statutes, have caused

courts to hesitate at the full logic of representative democracy. They have instead conferred a core of First Amendment protection on government employees, particularly those seeking "to bring to light actual or potential wrongdoing [in the inner workings of government] or breach of public trust." *Connick v. Myers*, 461 U.S. 138, 148, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1982). "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." *Waters*, 511 U.S. at ——, 114 S.Ct. at 1887 (citation omitted).

But exactly what speech by which government employees is protected?

Some speech, no matter what the rank of the official, merits no First Amendment consideration at all, for example, speech by government employees concerning matters of purely private concern.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

• • •

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Connick, 461 U.S. at 146-147, 149. 103 S.Ct. at 1690, 1691.

On the other hand, speech by government employees involving matters of "public concern" is protected, although the term is not self-defining.

> The courts of appeals have adopted various approaches for determining whether a topic of employee speech is of "public concern,". . . . Some courts have adopted a content-based analysis, focusing exclusively on " 'which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government, " . . . . Other courts have adopted an analysis which turns either entirely or in part on the employee's subjective intent, i.e., on whether the employee's speech "was calculated to disclose misconduct" or to inspire public debate on some issue of significant public interest. . . .

Appendix B

> As our own case law implicitly recognizes, the circumstances of a particular case may govern the appropriate approach under *Connick*. Where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the "form and context" of the expression. . . . On the other hand, public-employee speech on a topic which would not necessarily qualify, on the basis of its content alone, as a matter of inherent public concern (e.g., internal working conditions, affecting only the speaker and co-workers), may require a more complete *Connick* analysis into the form and context of the public-employee expression, "as revealed by the whole record," *Connick*, 461 U.S. at 148, 103 S.Ct. at 1690, with a view to whether the community has in fact manifested a legitimate concern in the internal workings of the particular agency or department of government, and, if so, whether the "form" of the employee's expression suggests a subjective intent to contribute to any such public discourse.

O'Connor v. Steeves, 994 F.2d at 913-914 (citations omitted).

In the *Elrod-Branti* context, as previously observed, courts have indulged the need of elected officials to select their immediate subordinates on the basis of loyalty. But does an administration have as free a hand in dismissing an official when speech rather than political affiliation is at issue? The answer is no. When government takes an adverse action arguably based on speech involving matters of public concern, the First Amendment requires that

> "[w]e apply the balancing test from *Pickering*. . . . *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government. It is true, on the other hand, as we stated at the outset of our opinion, supra, at 2355, that the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed. A reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement.

O'Hare Truck Service, — U.S. at — - —, 116 S.Ct. at 2357-2358 (citation omitted).[16]

While in "mixed" cases, where both speech and political affiliation are concerned, the *Pickering* mandates are "inevitable,"

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16. In *O'Hare Truck Service*, Justice Kennedy found it necessary to remand the case to the district court to determine, "including upon motion for summary judgment if there is no genuine issue as to material facts" whether *Elrod-Branti* or *Pickering* (or arguably both) governed. — U.S. at —, 116 S.Ct. at 2361.

in striking the balance, *Elrod-Branti* considerations must come into play.[17] The more senior the official, the more likely his statements will be perceived by the public as pronouncements of government policy, or in the case of his co-workers, as an invitation to insubordination. Thus, the higher an official's position, the more reasonable it would seem for an administration to insist on loyalty in both deed and word.

Here plaintiffs contend that they were dismissed for objecting to the hiring of political allies of the Mayor,[18] for objecting to the "mishandling" of two sexual harassment complaints by Riesenberg, and for protesting her politicization of BCC's personnel practices. *See* Plaintiffs' Supplemental Memorandum, at 1-4. These are matters, plaintiffs argue, of profound public concern.

In some respects, plaintiffs may be right. But simply to label one's speech a matter of public concern does not inevitably rig the *Pickering* scale against dismissal. Rather, as here, we must weigh the interest of the Mayor in entrusting policy functions to officials sympathetic with the aims of his administration against the plaintiffs' claims that their speech implicated matters of public concern. The most serious claim is the allegation that plaintiffs were fired for objecting to Riesenberg's "giving favorable treatment to, protecting, and covering up for certain individuals accused of sexual

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17. I say this mindful of Justice Scalia's dissenting view that the *Umbehr* and *O'Hare* decisions cannot be reconciled. — U.S. at —, 116 S.Ct. at 2372. Respectfully, I believe that they can.

18. Plaintiffs also label these hires as "unqualified," the plaintiffs, however, have presented nothing of a material nature of suggest that this is true.

harassment." Plaintiff's Supplemental Memorandum, at 10. The difficulty is that there is no evidence that this is true. Plaintiffs offer nothing that suggests a coverup or "suppression" of sexual harassment claims by Riesenberg. Plaintiffs offer evidence only of their disagreement with the manner in which Riesenberg chose to handle such complaints. Moreover, plaintiffs did nothing to bring their concerns about Riesenberg's decisions to public attention, or to the attention of anyone "with representative responsibility for acting in the best interests of the [City] and its citizenry." *O'Connor*, 994 F.2d at 917. To the minimal extent that plaintiffs voiced objections, they confined their remonstrations to Riesenberg, whom they portray as the problem, not the solution. There may be times when the fact that a sensitive matter is articulated privately to a government supervisor weighs in a plaintiff's favor as minimizing disruption of governmental functions "by limiting dissemination [of criticism] to the public authorities most directly concerned." *Id.* at 917 n.10. *See also Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415 n. 4, 99 S.Ct. 693, 696 n. 4, 58 L.Ed.2d 619 (1979). But here, even assuming that plaintiffs articulated more than mere disagreement with Riesenberg's decisions, they point to nothing that suggests that their speech "was calculated to disclose misconduct" or contribute to the public discourse. *See O'Connor v. Steeves*, 994 F.2d at 913-914.

In other respects, plaintiffs exaggerate the record. There is little or no evidence that they voiced any objection to Riesenberg's hiring of Clabaugh or to her suggestion that Clabaugh refuse a job interview to a politically undesirable applicant, or to her indulgence of job candidates sponsored by the Mayor, however much they may have privately disagreed with her actions. Speech unexpressed can hardly raise a subject

of public concern or be a basis for retaliation. Plaintiffs' vocal disagreements with Riesenberg over possible violations of the terms of a federal grant and a collective bargaining agreement fall within the category of internal office speech that *Connick* places altogether outside the protection of the First Amendment. In sum, I find that there is no evidence of any speech of the kind protected in the government workplace that would support a claim of retaliation.[19]

Because the plaintiffs' firings were not constitutionally impermissible, I need not address the claims brought against the Mayor personally,[20] although plaintiffs in any event have not made the showing of personal participation on the Mayor's part that would be necessary to establish liability. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901-902 (1st Cir.1988). The fact that the Mayor refused to overrule Riesenberg's decision to dismiss the plaintiffs or that he relied on the opinion of the Corporation Counsel that their firings were justified are insufficient to show the requisite degree of supervisory encouragement, or deliberate indifference on his part, necessary to show a constitutional violation. *See Hegarty v. Somerset County*, 53 F.3d 1367, 1379-1380 (1st Cir.1995).[21]

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19. Because I find that the City was justified in firing plaintiffs for their lack of political affiliation, and because I conclude that plaintiffs have failed to meet their burden of showing that they engaged in speech that the First Amendment would protect, I need not discuss the City's alternative defense that plaintiffs were terminated as part of a reorganization of BCC.

20. The plaintiffs' claim against the City fails for the same reason. Even if a custom or practice could be shown on the part of the City of Boston permitting its Mayors to freely discharge political subordinates, that is nothing that the law condemns.

21. Plaintiffs proffer several pleadings in unrelated cases and newspaper articles alleging that Mayor Menino has terminated other city employees

(Cont'd)

Appendix B

Count VI contains a common law allegation of wrongful termination, presumably pursuant to the public policy exception to the usual rule that permits the termination of at-will employees for any reason or for no reason at all. *See Jackson v. Action for Boston Community Development, Inc.*, 403 Mass. 8, 9, 525 N.E.2d 411 (1988). Whether a retaliatory firing violates public policy is a matter of law for the court. *Wright v. Shriners Hospital for Crippled Children*, 412 Mass. 469, 472, 589 N.E.2d 1241 (1992). While the Supreme Judicial Court has, in dicta, indicated that there may be circumstances in which a "whistleblowing" employee is entitled to public policy protection, Flynn and Wolfson's "speech", that is, their differences, expressed and unexpressed, with Riesenberg's decisions, does not fall within this narrowly circumscribed and as yet unestablished exception to the at-will rule. *See Mello v. Stop & Shop Cos.*, 402 Mass. 555, 560 n. 6, 524 N.E.2d 105 (1988).[22]

(Cont'd)
because of their political affiliation. These documents are inadmissible on the issue whether the Mayor had a direct hand in Riesenberg's termination of Flynn and Wolfson. *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir.1990) (hearsay evidence inadmissible at trial cannot be considered on a motion for summary judgment).

22. "Redress is available for [at-will] employees who are terminated for asserting a legally guaranteed right (e.g., filing workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury."). *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch.*, 404 Mass. 145, 149-150, 533 N.E.2d 1368 (1989). *See also Fairneny v. Savogran Company*, 422 Mass. 469, 471-472, 664 N.E.2d 5 (1996) (same, retaliation for carrying out ERISA fiduciary duty, redress preempted, however, by federal law). "In limited circumstances, we also have permitted redress 'for employees terminated for performing important public deeds, even though the law does
(Cont'd)

Appendix B

ORDER

For the foregoing reasons, the motions of defendants Mayor Menino and the City of Boston for summary judgment on Counts I, IV and VI of the Amended Complaint are ALLOWED. Defendant Riesenberg's motion for summary judgment as to Counts I, IV and VI of the Amended Complaint is also ALLOWED.

SO ORDERED.

RICHARD G. STEARNS
United States District Judge

(Cont'd)

not absolutely require the performance of such a deed.' " *GTE Products Corp. v. Stewart*, 421 Mass. 22, 26, 653 N.E.2d 161 (1995). *See DeRose v. Putnam Management Co.*, 398 Mass. 205, 208-210, 496 N.E.2d 428 (1986) (refusing to commit perjury); *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 810-811, 575 N.E.2d 1107 (1991) (cooperating with a government investigation). Disputes over internal business matters or policies cannot be the basis of a public policy exception to the at-will rule. *Smith-Pfeffer*, supra at 151, 533 N.E.2d 1368; (administrative policies and institutional reorganization); *Mistishen v. Falcone Piano Co.*, 36 Mass.App.Ct. 243, 24[illegible], 630 N.E.2d 294 (1994) (disagreement over manner in which employer honored its warranties); *King v. Driscoll*, 418 Mass. 576, 582, 583, 638 N.E.2d 488 (1994) (dispute over shareholder derivative suit contesting price to be paid under a stock buy back– "[t]his court consistently has interpreted the public policy exception narrowly"). "[I]t is not necessarily true that the existence of a statute relating to a particular matter is by itself a pronouncement of public policy that will protect, in every instance, an employee from termination." *Id.* at 584, 638 N.E.2d 488. In very limited circumstances, a corporate in-house counsel may have a claim for wrongful discharge if the claim "depends on (1) explicit and unequivocal statutory or ethical norms (2) which embody policies of importance to the public at large in the circumstances of the particular case, and (3) the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets." *GTE Products Corp., supra*, at 30, 653 N.E.2d 161.

APPENDIX C — EXCERPTS FROM 1994 BOSTON COMMUNITY CENTERS OPERATIONAL MANUAL

BOSTON COMMUNITY CENTERS
How it Works

Boston Community Centers (formerly Boston Community Schools) is a unique partnership between the City of Boston and its neighborhoods. The City provides a base budget, facilities and maintenance and technical assistance, and the neighborhoods, through Community Center Councils, assess their own needs, design programs to meet these needs and hire staff to run the programs.

The emphasis of Boston Community Centers is on the neighborhoods — on their empowerment and the importance of their role in decision making. The ordinance first "Empowering the Public Facilities Department to Conduct a Community School Program" in 1972 states that "community involvement in the decision making process shall apply to every phrase of the Community School Program."

The goals of the agency, as stated in the Plan of Operations for the Boston Community Schools Program, drawn up in 1974, read: The purpose of the Boston Community Schools Program is to stimulate the development of local community school councils in order that they may address themselves to the identification of local needs and problems, and introduce educational, social, cultural, and recreational programs, and other procedures in response to those needs and problems."

The partnership between the City and the neighborhoods relies on the Plan of Operations which outlines the rights and responsibilities of each of the participants in the Boston Community Center system and provides for checks and balances which keep the system working.

Appendix C

The rules, simply stated, are:

1. The Councils, representative bodies of neighborhood residents, identify needs, set program goals and objectives, and implement, manage and evaluate programs. They develop budgets and hire staff, maintain records and publicize their activities. Together with the Director of Community Centers, they hire Coordinators. They are responsible for preparing Workplans each year, for submission to the Boston Community Centers City Wide Board and approval by the Director.

2. The Administrative Coordinator is hired by the Council, with the approval of the Director, to administer the program and to work on community, council, and program organization. He/she runs the community Center for the Council by recruiting staff, preparing budgets, fund raising, managing the building, and implementing council policy.

3. The Director of Boston Community Centers, appointed by the Mayor, with the approval of the Boston Community Centers City Wide Board, heads the Community Centers Central Office, which acts as the agent of the City of Boston. This office has final administrative responsibility for the program, ensures the integrity and effectiveness of the program, and provides technical assistance. The Director approves individual budgets, workplans, coordinators, and is responsible for seeing that the Council elections are open, inclusive and well publicized. The Central Office provides technical assistance in legal and financial matters, program development and fundraising, community organizing, workplan preparation and public relations.

4. The City Wide Board is comprised of a member from each of the local Councils. Its purpose is to provide a forum for

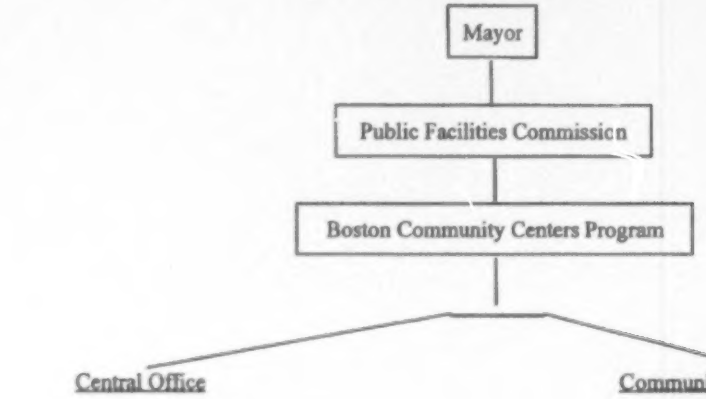
Appendix C

discussion of general Community Centers concerns, and to review and approve the director's policies, the city wide budget before submission to the Mayor, all job positions in the Central Office and some of the appointments to those jobs, and the appointmemt of the Director. The Board reviews all Workplans and acts as a grievance committee in the case of conflicts between a Council and the Central Office.

revised March 1994

GOVERNANCE CHART #3

DELIVERY OF SERVICES, PROGRAM ADMINISTRATION
ROLES AND RESPONSIBILITIES



Central Office

- Assures delivery of quality services
- Approves hiring of Community Center Coordinators
- Develops annual departmental budget
- Disperses city and centrally generated funds
- Provides technical assistance to Local
- Coordinates Council and staff training
- Assures programmatic compliance with all city policies, laws, regulations, and contracts
- Approves Local workplans

Community Center Program

- Administers Local Community Center Program
- Conducts needs assessment
- Designs and implements Local programming
- Raises funds
- Manages Local facility
- Develops and implements Local workplan
- Evaluates Local services

Supreme Ct., U.S.
FILED
SEP 22 1998
OFFICE OF THE CLERK

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No. 98-153

In The

Supreme Court of the United States

October Term, 1997

KEVIN N. FLYNN and RANDY WOLFSON,

Petitioners,

v.

CITY OF BOSTON, THOMAS MENINO
and EVELYN RIESENBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the First Circuit Court of Appeals properly affirmed summary judgment, entered for the Respondents by the United States District Court for the District of Massachusetts, where Petitioners held policy making positions within a municipal agency which were fairly subject to a political test;

Whether the First Circuit Court of Appeals properly affirmed summary judgment, entered for the Respondents by the United States District Court for the District of Massachusetts, where Petitioners failed to adduce evidence to support their claim that they were terminated from their positions in retaliation for their exercise of their First Amendment right of free speech;

Whether the First Circuit Court of Appeals properly affirmed summary judgment, entered for the Respondents by the United States District Court for the District of Massachusetts, that Respondents' interest as employer outweighed Petitioners' rights to criticize the employer.

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Cases:

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42 U.S.C. § 1983	2
United States Constitution:	
First Amendment	i, 2, 3, 4, 9, 10, 11
Fourteenth Amendment	2
Rule:	
Supreme Court Rule 14.1(a)	15

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts are reproduced in the Appendices to the Petition (hereinafter "A.: __). (A-1a, A-22a).

STATEMENT OF JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. § 1254 and respondents are satisfied with this statement of jurisdiction.

STATEMENT OF THE CASE

Respondents are not satisfied with the Statement of the Case presented in the Petition as it contains misstatements of the record below. Respondents submit the following Statement of the Case, taken from the opinions issued by the First Circuit and District Court:

Petitioners were discharged from their positions with the Boston Community Centers ("BCC"), a City of Boston agency with approximately 400 employees and an annual budget of approximately $15 million dollars. The agency is concerned with the delivery of social services to city residents.

In January 1994, the newly elected Mayor of the City of Boston appointed Evelyn Riesenberg, formerly one of his special assistants, as the Executive Director of BCC. Flynn and Wolfson were at that time two of the four senior management of BCC who reported directly to the Director. Flynn's job duties included authority over human resource issues, supervision of grants managers and personnel director, labor negotiations, and liaison responsibilities with a number of city and state agencies.

Wolfson supervised approximately half of BCC's neighborhood sites, oversaw programs provided to City residents (such as an after-school athletic league), served as liaison to two city agencies, oriented new council members, and monitored compliance with legal requirements.

Taking the facts in the light most flattering to the petitioners for purposes of summary judgment only, respondents conceded that Riesenberg asked petitioners to inform her of the political affiliation of other employees within BCC; ordered petitioner Flynn to process a pay raise for an employee in violation of the union contract, and mishandled several sexual harassment complaints and related personnel actions, despite petitioners' objections.

In August 1994, Riesenberg terminated all four associate directors, asserting that she was reorganizing the agency. Petitioners protested and threatened litigation if they were not reappointed. In response, Corporation Counsel for the City of Boston wrote to petitioners that their termination was due to the reorganization of the agency and an evaluation of their performance. Petitioners allege that these reasons were pretextual.

Suit was filed in the United States District Court for the District of Massachusetts, pursuant to 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendments and state statutory and common law claims. The District Court dismissed several claims after hearing on Respondents' motion to dismiss and, at summary judgment, entered judgment for the Respondents on the remaining counts of the complaint. The District Court held that the Petitioners were confidential employees, such that political loyalty and affiliation were appropriate job requirements, and further held that the "speech" for which they claimed to have suffered retaliation was not subject to the protections of the First Amendment.

The Court of Appeals for the First Circuit affirmed, holding that public employees holding confidential, mid- or upper-level positions, who are dismissed for political grounds, are not entitled to the First Amendment's protections against politically motivated discharge. The First Circuit also affirmed summary judgment on the petitioners' retaliation claim, holding that even if petitioners were terminated due to their speech on issues related to the operation of the BCC office, the terminations were lawful as Riesenberg was permitted to conclude that she did not have the confidence and trust in petitioners necessary to retain them.

The First Circuit reversed summary judgment on the pendant state law claims, and remanded those claims to the state court. The order of remand was stayed pending resolution of the petitioners' writ to this Court.

REASONS FOR DENYING THE WRIT

The District Court and the First Circuit Court of Appeals properly applied the fact-specific test, outlined by this Court in *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980), for determining whether Petitioners were confidential employees, and properly concluded that Petitioners fit within the narrow category of public servant for whom party affiliation was an appropriate job qualification.

The lower courts also extended their analysis to Petitioners' separate claims of retaliation for protected speech, and in so doing, applied the analysis developed by this Court in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1982). Again, the lower courts correctly concluded that even if Petitioners could demonstrate that their speech was on issues of public concern, an application of the *Pickering* balancing test mandated judgment for the respondents.

Petitioners' arguments that the First Circuit was "confused" about how to administer the joint application of the *Elrod/Branti* and *Pickering* doctrines, and that the decision in this case created a "new rule," are incorrect. The First Circuit considered both the *Elrod/Branti* issues and the *Pickering* analysis of the Petitioners' speech *seriatim*, and in so doing applied consistently the rule first articulated by this Court in *Waters v. Churchill*, 511 U.S. 661, __, 114 S. Ct. 1878, 1886 (1994), namely that a high ranking governmental official enjoyed fewer First Amendment protections than did a low ranking employee or private citizen. (A:8a). Petitioners' predictions that other circuits would have reached different results are irrelevant in light of the propriety of the First Circuit's application of the law.

The Petitioners' argument that state law forbidding coerced political contributions or activity, and a local ordinance governing the contents of local ballots, somehow trump Supreme Court First Amendment jurisprudence is without authority or applicability to this dispute.

I.

THE LOWER COURTS PROPERLY FOUND THAT PETITIONERS OCCUPIED POLICYMAKING POSITIONS.

The First Amendment prohibits the dismissal of public employees based solely upon party affiliation, unless the employer can demonstrate that party affiliation is an appropriate requirement of the employee's position. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The First Amendment also enjoins the dismissal of a public employee in a non-policy making position solely because of his or her political affiliation or lack of political sponsorship. *Branti v. Finkel*, 445 U.S. 507, 516-517 (1980).

Although fact intensive, the question of whether a governmental position is "political" is a question of law to be determined by the court. *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 12 (1st Cir. 1996) (citing *McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 93 (1st Cir. 1989) (Breyer, J.)). "Whether a government position is 'political' does not depend on . . . labels . . . but on the *substance of the duties inherent in the position itself*." *Id.* at 12 (emphasis in original). The court first asks whether the overall functions of the agency involve

> decisionmaking on issues where there is room for political disagreement on their goals or implementation? . . . [T]he next step is to examine the particular responsibilities of the position to determine whether it resembles a policy maker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement.

Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241-242 (1st Cir. 1986) (en banc).

BCC is an agency of the City of Boston, composed of forty one community centers throughout the City, which implement recreational, educational, senior, child care, youth work and other community programs. BCC has an approximate total of 400 employees and a total budget of some $15 million. Accordingly, the uncontested facts establish that the overall functions of BCC involve decisionmaking in which there is room for political disagreement, thus satisfying the first prong of the *Jimenez Fuentes* test.

Further, both Petitioners' own description of their job responsibilities demonstrate that they acted as high level,

confidential employees for whom political affiliation was an appropriate requirement. An employee's own testimony regarding his or her actual job duties is often dispositive of the employee's status as a confidential employee. *Jimenez Fuentes*, 807 F.2d at 244-245; *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir. 1993). Such is the case here. Flynn acknowledged, both in the amended complaint and at deposition, that as the associate director of administration and finance at BCC, he worked as the direct liaison to many City departments, as well as with various state and federal agencies, had oversight of all finance and personnel functions within the BCC, was responsible for preparation and implementation of the department budget and the supervision of state, federal and private grant management, management of the agency's payroll and contract functions. He also provided fiscal, legal and personnel assistance to the non-profit corporate arms of the centers. Flynn testified that, during the annual preparation of the BCC budget, he established a budget committee, worked with the treasurer of the Citywide Board to prepare for briefings with the City Budget Department, and would prepare the Director for City Council budget hearings. Flynn also acted as liaison to the City's Law Department and Labor Relations Department. With regard to the Labor Department, when the BCC senior staff began to organize, Flynn was "appointed the lead negotiator for labor relations."

As the lower courts correctly held, Flynn's description of his duties with the BCC demonstrate that he was exactly the type of confidential employee for whom political affiliation is an appropriate job requirement. Flynn performed duties that entailed policymaking, representational activities, ministerial duties, and personnel oversight. *See Jimenez Fuentes*, 807 F.2d at 244; *O'Connor*, 994 F.2d at 911 (1st Cir. 1993). In reporting to the Executive Director, and as liaison to City departments (including the Law Department and as representative of BCC

for labor relations matters), Flynn was privy to confidential information. As an Associate Director with oversight of a $15 million plus budget and as the Executive Director's designee for hirings, purchasing and expenditures, Flynn proposed, established and implemented policy. These major responsibilities meant that policy disagreements with his politically appointed supervisor could lead to less effective implementation of political goals. Flynn was therefore sufficiently responsible for policymaking at the BCC to make his position one for which political affiliation was an appropriate requirement. *Jimenez Fuentes*, 807 F.2d at 245.

Similarly, plaintiff Wolfson, as BCC's Associate Director of Field Services, occupied a position for which political affiliation is an appropriate job requirement. She alleged and testified that her responsibilities included overseeing the operations at twenty community centers, including recreation aquatics, programming, personnel, and budgets, monitoring the various programs of the BCC for compliance with municipal, state and federal regulations, providing technical assistance to the non-profit corporate arms of the centers, writing the operational and non-profit fiscal compliance manuals for the agency, and supervision of capital improvements, maintenance, and repairs. Wolfson was the liaison between the BCC and the City of Boston's Public Facilities Department and the Real Property Department. Wolfson also drafted a manual for BCC, an orientation packet for council members, and a transition report when Thomas M. Menino became Mayor that included a program profile for BCC. Wolfson testified that her position entailed orientation for the new members as requested and development of new advisory boards. Wolfson could also recruit and present candidates for employment, and on some occasions would recommend finalists for the Executive Director after she had screened and interviewed applicants. As the district court properly concluded, Wolfson was privy to confidential

information. She had greater interaction with the public than did Flynn, and had the authority to represent top management of the organization to the community and the BCC's 400 employees. She handled matters that were "potentially subject to partisan political differences" and her job "involved at least a modicum of policymaking responsibility." *Mendez-Palou v. Rohena Betancourt*, 813 F.2d 1255, 1258-1259 (1st Cir. 1987).

The Petitioners incorrectly argue that the First Circuit applied a "weakened" *Branti* test which incorrectly resulted in the conclusion that policymaking duties were inherent in Petitioners' positions. Petitioners also argue that the law on this issue throughout the Circuits is so confused as to be in need of clarification by the Supreme Court. Neither position has merit.

Petitioners misapprehend the First Circuit's rejection of a "mechanical formula" based solely on titles rather than on actual duties for a "weakened test." In fact, the First Circuit has consistently applied the fact-specific test first enunciated by this Court in *Branti*, which rejected reliance on job labels, and instead required the lower courts to examine the "substance of the duties inherent in the position itself." *Branti*, 445 U.S. at 518. The First Circuit appropriately focused on the duties Petitioners described at deposition in determining that the Petitioners were high level, confidential employees for whom a political loyalty was a legitimate requirement. Thus, in the First Circuit, low level positions within local governments (the majority of the workers in most agencies of government) are provided protection against politically motivated firings, while high level employees who are "significantly connected to policy-making" are not. (A:4a). As dicta in *Branti* suggests, a public employer may reasonably believe that the official duties of employees who "explain [the official's] views . . . or communicate with the legislature cannot be performed

effectively unless those persons share [her] political beliefs and party commitments." *Branti*, 445 U.S. at 518. The First Circuit's decision demonstrates that it appropriately conducted the fact specific inquiry into the duties that Flynn and Wolfson each performed, and properly concluded that those duties — acting as liaison and delegate in legal and labor negotiations, representing the face of the agency to employees and city residents — properly implicated the duties of a high level, confidential official for whom party affiliation was a proper requirement of the position. This analysis is squarely in line with that articulated by this Court in *Branti*. The First Circuit did not misapply the *Branti* analysis[1].

II.

THE LOWER COURTS PROPERLY APPLIED THE *PICKERING* AND *CONNICK* BALANCING TESTS TO PETITIONERS' "SPEECH," AND PROPERLY CONCLUDED THAT THE BALANCE OF INTERESTS FAVORED THE EMPLOYER.

It is beyond serious dispute that governmental employees have no First Amendment protections when the speech in question addresses matters of purely private concern:

> When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in

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1. Petitioners' claims that other circuits would have reached results different from the First Circuit's conclusion in this matter is without weight. As the First Circuit has properly applied the common law as developed by the Supreme Court in this area, the results reached in other jurisdictions have no bearing on the validity of the decision at issue here.

> managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — *and certainly every criticism directed at a public official* — would plant the seed of a constitutional case. *Connick v. Myers*, 461 U.S. 138, 146-147, 149 (1982) (emphasis added).

The District Court considered Petitioners' claims that they were terminated in retaliation for their criticisms of the mishandling of sexual harassment complaints and the "politicizing" of employment practices within the BCC, and concluded that

> [T]he difficulty is that there is no evidence that this is true. Petitioners offer nothing that suggests a coverup or "suppression" of sexual harassment claims by Riesenberg. . . . In other respects, Petitioners exaggerate the record. There is little or no evidence that they voiced any objection to [Riesenberg's alleged hiring practices], however much they may have privately disagreed with her actions. . . . Speech unexpressed can hardly raise a subject of public concern or be a basis for retaliation. Petitioners' vocal disagreements with Riesenberg over possible violations of the terms of a federal grant and a collective bargaining agreement fall within the category of internal office speech that *Connick* places altogether outside the protection of the First Amendment. (A:44a-45a).

Although the First Circuit did not reach the issue of whether the content of the Petitioners' speech was deserving of First Amendment protection, the District Court's *Connick* analysis

is dispositive: Petitioners can have no First Amendment claim for retaliation when the record at summary judgment is bereft of evidence that their speech was on any issue of public concern.

Further, the courts have held that the First Amendment rights of governmental employees are not absolute, even in those instances where the speech at issue concerns matters of public concern. *See Connick*, 461 U.S. at 148. Rather, the courts recognize the particular concerns of the government in its role as an employer, and measure the employee's interest in speaking against the disruption to the workplace that can flow from that speech. This Court established a balancing test, articulated in *Pickering v. Bd. of Ed. of Township High School Dist. 205 Will Cty.*, 391 U.S. 563 (1968), which considers the governmental employer's interest in the functioning of the government agency without interruption, against the employee's interest in contributing to the public debate.

Recognizing these long established principles, the First Circuit concluded that Petitioners, high level employees within the BCC, could be discharged from their positions both for political reasons, and for speech which touched on matters of public concern. "Indeed, without this congruence, the latitude allowed to the superior by the Supreme Court could be effectively nullified." (A.10a). Petitioners complain that the First Circuit has, by so deciding, created a "new rule" out of whole cloth which is in conflict both with the holdings of this Court and with that of other circuits. Their argument is erroneous.

The First Circuit has merely restated what this Court has previously held:

> [t]hough a private person is perfectly free to uninhibitedly and robustly criticize a state

> governor's legislative program, *we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing* . . . The public interest in the efficient delivery of government services is served by minimizing disruption in the government workplace. Consequently, we give deference to government predictions of harm even where unwelcome speech involves no "tangible, present interference with [an] agency's operation." *Waters v. Churchill*, 114 S. Ct. 1878, 1886-87 (1994) (emphasis added). Thus, a high level official of a local government may be "fired" if he criticizes the policies of the incumbent official, regardless of the wisdom of those policies or the trenchant nature of the critique.

Despite Petitioners' calls of alarm, this rule appropriately demonstrates that an individual who chooses to work as a government employee, and who chooses to accept the responsibility of working closely with elected officials, necessarily surrenders some right to criticize those officials — at least if the employee wants to retain the position. As this Court has carefully articulated, "[t]he First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge, . . ." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 (1990), but

> [a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.

Local government officials also have a legitimate interest in ensuring that dissident statements from high-ranking officials are not confused with the statements of the incumbent, thus undermining the legitimacy of government in the eyes of the

public. *Board of Cty. Comm'rs, Wabaunsee County v. Umbehr*, U.S. __, 116 S. Ct. 2342, 2347-2348 (1996) (citations omitted). Thus, this Court in *Umbehr* held that a local government's "interest in achieving its goals as effectively and efficiently as possible" was a significant one when it acted as an employer. Similarly, courts have recognized a legitimate need for governments to rely on loyal staffers in order to fulfill electoral promises:

> In order for the new administration to be given an opportunity to fulfill expectations, it must have available and also appear to have available significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure . . .

Jiminez Fuentes v. Torres Gaztamibe, 807 F.2d 236, 241 (1st Cir. 1994).

The First Circuit's conclusion, namely that high ranking employees may be terminated for reasons relating to political affiliation *and* in response to speech on matters concerning the operation of the agency, is thus clearly within the precedents issued by this Court. Indeed, the position pressed by the respondents would effectively remove *any* discretion in hiring or firing decisions from the elected official. The result would be that a high level government official could "confer tenure on himself by opportunistic denunciations of his employer's policies." (A.35a). Such a result would emasculate the powers of elected officials, nullify local elections, and would remove the functioning of municipal governments from the electorate and place it in the hands of life-long bureaucrats. Such a rule is without basis in the law, or indeed, in the workings of a democratic society.

III.

STATE LAW DOES NOT MANDATE REJECTION OF FIRST AMENDMENT JURISPRUDENCE.

Petitioners cite Massachusetts General Laws chapter 55, section 16 for the proposition that their terminations were unlawful. The statute prohibits any attempt to coerce financial contributions or political service. Nothing in the record supports any claim that Petitioners were coerced into donating to any political party. Nothing in the record supports Petitioners' claims that they were forced to provide political service to any political party or person. The City of Boston ordinance cited by Petitioners governs the substance of ballots used in municipal elections. This ordinance is wholly inapplicable to the issues in this litigation. The Petitioners' federalist argument should be disregarded in evaluating their petition for certiorari.

IV.

JUDGMENT PROPERLY ISSUED FOR RESPONDENTS THOMAS MENINO AND THE CITY OF BOSTON AND SHOULD NOT BE REVISITED.

Respondents submit that the Petitioners have waived any appeal of the entry of summary judgment for Thomas Menino individually, and for the City of Boston, as Petitioners have failed to brief any argument against entry of judgment for these Respondents either at the First Circuit or in their petition for certiorari. However, Petitioners have named both the City and the Mayor as respondents in their petition. As Petitioners have failed to raise any appeal of the District Court's ruling in favor of the City and the Mayor, those issues are waived and this Court should decline to consider any argument offered by Petitioners on the issue of either the Mayor's or the municipality's liability.

Supreme Court Rule 14.1(a) makes clear that "[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a). Additionally, this Court has held that it will "not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638, 645 (1992). As Petitioners have failed to raise any issue concerning the Mayor or the City in their petition for certiorari, no claims against these Respondents should be entertained by this Court, notwithstanding the inclusion of these Respondents as respondents in the Petitioners' petition.

CONCLUSION

For the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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